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IN THE

Supreme Court of the United States

October Term, 1943.

(Consolidated Causes: California Supreme Court, L. A. No. 18066)

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent.

(Superior Court No. 3783)

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent.

(Superior Court No. 3817)

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

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NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent,

(Superior Court No. 3817)

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE CALIFORNIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The City of Los Angeles, a municipal corporation of the State of California, and Department of

Water and Power of The City of Los Angeles, a department created by the Charter of said City and (with its predecessors under said Charter), at all times herein mentioned furnishing to said City and its inhabitants, *in a proprietary capacity as a public utility*, a water service and a hydroelectric service, respectfully pray, both jointly and severally, that writs of certiorari issue out of this Honorable Court to review the decision and judgment of the Supreme Court of the State of California,[1] filed and entered on November 4, 1943, in those certain consolidated causes therein entitled "Natural Soda Products Company, Plaintiff and Respondent, vs. City of Los Angeles, *et al.*, Defendants and Appellants" (Superior Court No. 3783), and "Natural Soda Products Company, Plaintiff and Respondent, vs. City of Los Angeles, *et al.*, Defendants and Appellants" (Superior Court No. 3817), and on the register of said Supreme Court of California, numbered and designated "L. A. No. 18066," and wherein your petitioners' application for a rehearing (filed within the time allowed by law and the rules of said court last named), was by it denied on December 2, 1943.

Said decision and judgment *affirmed* the consolidated judgment of the Superior Court of the State of California in and for the County of Inyo, entered in said causes on April 29, 1941, adjudging that respondent recover from petitioners, "and each of them," damages in the sum of

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[1]Reported in 23 A. C. 190; 143 Pac. (2d) 12. [For copy of majority and dissenting opinions, see Appendix A, in separate volume filed herewith.]

$153,573.85, with interest thereon and three-fourths of the costs of suit (Superior Court No. 3817), but denying the injunction sought by respondent (Superior Court No. 3783).

The said judgment of said Superior Court in so far as the same awarded damages as aforesaid, had previously in an opinion filed December 14, 1942,[2] been *reversed* by the District Court of Appeal of the State of California, Fourth Appellate District.

Jurisdiction.

The effect of the decision and judgment whereof review is here sought is to deprive petitioners of their property without due process of law, contrary to the provisions of Article XIV, Section 1, of the Amendments to the Constitution of the United States. Petitioners made *timely claim* of title, right, privilege and immunity thereunder in their said petition for a rehearing by the Supreme Court of California, filed on November 18, 1943.[3]

The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 [U. S. Code, Title 28, Section 344 (b)].

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[2]Reported in 56 A. C. A. 108; 132 Pac. (2d) 533. [For copy of opinion, see Appendix B, in separate volume filed herewith.]

[3]In the first of their briefs on appeal in the State courts, and in three subsequent ones filed therein prior to the rendition of said decision and judgment, petitioners made the same claim under the 14th Amendment, and also under Article I, Section 13, of the Constitution of California.

Summary Statement of Facts.

The City of Los Angeles, a municipality in California having a population in 1937 of more than 1,300,000 persons [Finding 6], now obtains and for many years has obtained, its principal supply of water[4] for domestic and other uses from Owens River, a stream draining the eastern slope of the highest portion of the Sierra Nevada Mountains and emptying into Owens Lake in Inyo County, California, the river's *natural* outlet. Owens Lake itself has *no* outlet and is therefore saline. The water for supplying the City is diverted from Owens River at a point thereon (Intake, formerly Aberdeen), some 25 miles upstream from Owens Lake, by means of a conduit known as the "Los Angeles Aqueduct," consisting of a series of canals, tunnels, pipes and siphons extending southerly from Intake, a distance of approximately 223 miles to reservoirs in and near The City of Los Angeles. The flow of water in the Aqueduct is by gravity.

The damages awarded respondent by said consolidated judgment were for losses claimed to have resulted from the *discharge* from Owens River into Owens Lake of so much of the *natural flow* of that river in the months from February to June, inclusive, 1937, as was in *excess* of petitioners' then *diversions* therefrom. Such diversions in that year and also in the months in question were *greater in volume* than in any prior corresponding period, but

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[4]During ten or more of the years preceding 1941, three-fourths of the City's water supply was derived from Owens River [Finding 4], and the remaining one-fourth from the Los Angeles River under the City's pueblo right. [For definition of such "pueblo right", see *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, at 117-122, and cases there cited.]

were *less* than the full *capacity* of the Los Angeles Aqueduct and its appurtenant surface reservoirs. There was also available to petitioners underground storage space in Owens Valley that could have been additionally availed of by increased spreading of surplus water on their lands, thus permitting of the percolation of some part thereof into the subsurface waterbearing strata.[5]

The existence of such surplus river flow in excess of petitioners' diversions was due to the *recurrence* in 1937 of the first wet year following an *unprecedented drought* of 18 years' duration (1919-1936), during which the surface of the salt cake that had formed in Owens Lake above the underlying brines became relatively dry,—*i. e.*, devoid of surface water. In 1937, the natural,—*i. e.*, unaugmented,—flow of Owens River increased *three-fold* as contrasted with the two years (1930-1931) immediately preceding respondent's acquisition of its properties. Although petitioners' diversions in that year and in the months in question were *higher* than in any *prior* corresponding period of the Aqueduct's history, their increase was less than the increase in the natural river flow by the 50,000 acre feet of surplus water that flowed into Owens Lake. The drought was of such severity that the then natural river flow was far short of petitioners' current needs for water and, during that period, such natural stream flow was augmented by pumping from the under-

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[5]In seasons of plentiful precipitation,—*i. e.*, when alone would it be necessary to dispose of surplus water by spreading,—the volume thereby withheld from Owens Lake is only about 35% of the total water spread,—the remaining 65% constituting the *return flow* that finds its way back into Owens River. [Deft. Exhibits Z 36 (1) and Z 36 (2).]

ground waters of Owens Valley; but there was *no* such augmentation of the natural river flow *in 1937*.

Prior to said 18 years' drought, there were, commencing with the Aqueduct's operation 1913, annual flows of water from Owens River into Owens Lake greatly in excess of such flow in 1937, the range being from a minimum lake discharge of 121,000 acre feet in 1913 to a maximum of 370,000 acre feet in 1914. Before the Aqueduct's operation, these lake discharges had ranged from a minimum of 206,000 acre feet in 1912 to a maximum of 413,000 acre feet in 1911. [Plff. Exhibit 1, p. 118.] The available water in 1937 was 368,000 acre feet (of which 293,000 acre feet constituted the flow of Owens River at Intake [Plff. Exhibit 1, p. 23] and 75,000 acre feet constituted the flow of lateral streams below Intake tributary either to Owens River or directly to Owens Lake. [Deft. Exhibit Z 11.] As contrasted with these figures, in the *five* driest years of the drought (1924-1925, 1929-1931), this water naturally available,—*i. e.*, surface flow unaugmented by pumping,—was, respectively, as follows: 139,000, 156,000, 159,000, 154,000 and 133,000 acre feet. [Plff. Exhibit 1, p. 22; Deft. Exhibit Z 11.] These figures include both the flow of Owens River and the flow of said lateral streams, and their annual *average* (148,000 acre feet) is only a trifle over *one-half* of the flow of Owens River *alone, and only 40%* of the *total* water available, in *1937*.

On the other hand, prior to the drought, there had been between 1906 and 1918, inclusive, *six* annual flows of Owens River *in excess* of that of 1937 (293,000 acre feet),—their range being from 339,000 acre feet in 1909 to 468,000 in 1906, and three other annual river flows

(1910, 1915, and 1917) of the approximate order of that of 1937. [Plff. Exhibit 1, pp. 21, 23.] These flows are to be contrasted (a) with petitioners' *highest* annual diversions *from Owens River* prior to respondent's acquisition of its properties (265,000 acre feet in 1922), and (b) with their highest *total* annual diversions into Haiwee Reservoir (265,000 in 1927), and (c) with their *still higher* diversions *in 1937* (271,000 acre feet *total*, of which 260,000 acre feet were *from Owens River*). [Plff. Exhibit 1, pp. 63-64.]

Notwithstanding petitioners' failure in 1937 to operate their said facilities to capacity, the actual extent of their use amply sufficed to supply the demands for water served by them from the Owens Valley source of supply. In *no* year prior to 1937 and in *no* portion of any prior year from February to June, inclusive, had the Aqueduct been operated to *as great* a capacity as in 1937 and in the same months of that year; but despite this circumstance, there has never been a shortage of water in Los Angeles.

The Aqueduct was completed in 1913[6] and has since been continuously operated, the volume of diversions therethrough exhibiting a long term *increase*. Extra capacity beyond current needs was provided therein looking to an anticipated increase in the demands served thereby, but such demands have *not* heretofore required the full use of such capacity.

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[6]The Aqueduct, for much the larger part of its course, traverses public lands, rights of way therein having been granted to The City of Los Angeles by Act of Congress approved June 30, 1906 (Public No. 395), "for conveying water to The City of Los Angeles". Apart from this legislative action, the work was, for its day, of monumental magnitude and of consequent general notoriety.

At Intake, immediately below the entrance into the Aqueduct canal, there is a diversion dam across Owens River, equipped with mechanically operated outlet gates and with overflow weirs whereby the whole or any lesser quantity of the flow of Owens River may be permitted to continue its natural flow down the natural river channel and thence into Owens Lake, the river's natural outlet. This diversion dam is between 200 and 300 feet in length, and along it stop, standing about 3 feet in height, are the mechanical appliances for operating the outlet gates and also the electric light standards for illuminating the structure. Within the Aqueduct canal, a short distance below its entrance from the river, are control gates whereby the water of the river may, at will, be excluded totally or in part from said canal or admitted thereinto in any amount within its capacity. By means of these gates and of the outlet gates and weirs in the diversion dam, petitioners can *regulate,* and they have *always* so regulated, the volume of their diversions into the Aqueduct in correspondence with the *demands* for water served by them. Obviously, during the drought, there was but little occasion to exclude water from the Acqueduct, the river flow being so far less than petitioners' needs for water, that they were then under the necessity of augmenting the natural stream flow by pumping from the underground water basin in Owens Valley.

On the Aqueduct, some 51 miles below Intake, is Haiwee Reservoir into which empties the upper aqueduct canal, and which was the only headwater storage reservoir of petitioners in existence in 1937. The Aqueduct canal between Intake and Haiwee Reservoir has always had a capacity of 800 second feet, but the Aqueduct below Haiwee Reservoir, which was originally of 400 second feet ca-

pacity, had such capacity increased to 480 second feet in 1931-1932. The length of this lower portion of the Aqueduct is approximately 171 miles and comprises covered canals, tunnels, pipes, and siphons. At its lower or southerly end are the necessary storage and regulating reservoirs, both for serving the City with water and for generating electric power for distribution within the City.

In 1929, petitioners created Tinnemaha Reservoir on Owens River, about 5 miles upstream from Intake, by throwing a dam across the river between the high lands beyond the channel on either side thereof. This is *not* a storage reservoir, its purpose and sole normal function being to *regulate* flows of the river in excess of 800 second feet by automatic temporary detention and subsequent release with the river's subsidence. At ordinary stages of the river, there is no water held therein, the defined natural river *channel* traversing the reservoir site and its flow discharging through a tunnel of a capacity of 800 second feet constructed in the river channel under the dam.

In addition to the control gates and the outlet gates at Intake, there are along the course of the Aqueduct gates for de-watering the same whenever such course becomes necessary, *e. g.,* in emergencies or for necessary maintenance and inspection. Water discharged from many of these gates would flow out upon lands in the Mojave Desert and/or across public highways, and one thereof discharges directly into Santa Clara River, a coastal stream crossed by the Aqueduct near its lower end and emptying into the Pacific Ocean. Petitioners have *no flowage rights* either in lands beyond the watershed of Owens Lake or in the Santa Clara River, and such discharges of water as

they are there compelled to make, are, in a few cases, by temporary limited permission, but for the most part give rise to claims for damages and threats of injunction, thus imposing upon petitioners the necessity of buying their peace. This is true even in respect of the Santa Clara River whenever such discharges thereinto occur during its high stages.

In 1932, respondent acquired a plant, on the bed of Owens Lake and on the shore thereof, for the extraction and processing of the lake brines. Such brines underlie a salt cake that has formed above them and, in 1932, the surface of this salt cake was virtually devoid of water. Without inquiry as to any of the factors entering into the presence or absence of water in the lake, respondent "*assumed*" that the lake surface would "continue" dry. In so "assuming," it *relied* entirely upon the then physical *appearance*, although it *knew* of the existence of the Los Angeles Aqueduct and of the fact that its purpose was to supply the City with water. This assumption was made notwithstanding the fact that *before* purchasing its properties, respondent was affirmatively advised by a written report made in 1930 by engineers employed for that purpose, that at the date of such report,—*i. e.*, after 10 years of unprecedented drought,—the inflow into Owens Lake from Owens River and other tributaries thereto was then merely *balanced* by evaporation losses and the industrial withdrawals of brine from the lake.[7] [Defts. Exhibit C, pp. 19-20.]

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[7]The report referred to was made to Mitchum, Tully & Company in April, 1930, and they were the parties actively promoting respondent's acquisition of its properties and were respondent's then principal stockholders.

The dry condition of the lake was the *resultant* of petitioners' diversions and the abnormally low stage of Owens River during said drought that commenced in 1919 and was only definitely broken in 1937. During these 18 years, petitioners' diversions, although *less* in volume than in 1937, took all, or virtually all, of the river flow, thereby practically discontinuing, for the duration of the drought, its discharge into Owens Lake;[8] but, with the return of wetter years, commencing in 1936, such discharge was resumed in considerable volume, and in the months of February to June, inclusive, 1937, was *actually* 44,397 acre feet, although the court found such discharge to have been "approximately 50,000 acre feet [Finding 11],—apparently for the reason that for the *full year* such discharge was 54,571 acre feet, while such discharge from Owens River *and* the lateral streams for the *full year* was 61,522 acre feet. [Plff. Exhibit 1, pp. 119 and 138.]

The successful operation of respondent's plant was dependent upon the absence of surface waters from the salt cake in Owens Lake, the principal interferences by such water being through dilution of the underlying brines and, more especially, through the cutting off therefrom of the solar heat whereby they are caused to attain a higher de-

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[8]There was no complete discontinuance of such discharge in any year, but in nine years of the drought, none of the river flow at Intake contributed thereto [Pltff. Exhibit 35], such discharge in those years being the make of the stream below Intake,—a circumstance demonstrative of the uninterrupted physical existence of the channel of Owens River and of its functional continuity as such.

gree of alkalinity than would be otherwise possible. The discharge from the river into Owens Lake in the spring and summer of 1937 raised its water level by approximately 2½ feet, and, in addition to doing damage to respondent's physical properties on the lake bed, so prevented the lake brines from attaining alkalinity as to greatly curtail respondent's output of soda ash obtainable therefrom. During such flow of water into Owens Lake, the Aqueduct gates at Intake were so operated as to exclude from the Aqueduct, and thus permit to flow down the river channel below, the *surplus* river flow *not required* by petitioners, such operation conforming to petitioners' practice throughout the history of the Aqueduct whenever the river flow was in excess of their needs. Even during 9 of the 18 years of drought, the outlet gates in the diversion dam were opened for periods aggregating just short of 99 days. [Plff. Exhibit 35.] The obvious reason for such curtailed operation of these gates was the low stage of the river and the consequent *nonexistence*, during most of the period of drought, of any *surplus* water whatever in excess of petitioners' current diversions, although such diversions were then annually much less in volume than in 1937.

Statutes Involved.

The pertinent provisions of the Constitution and laws of the United States and of the Constitution and laws of the State of California are the following:

Constitution of the United States, 14th Amendment, Section 1;

Judicial Code, Section 237 (b); U. S. Code, Title 28, Section 344 (b);

Constitution of California, Article I, Section 13;

Constitution of California, Article XIV, Section 3;

Civil Code of California, Sections 1410, 1411, 1415 and 1416;

Water Commission Act of California, Section 20; Cal. Stats. 1917, p. 746.

The pertinent provisions of said Constitutions and laws are set forth in Appendix C, appearing in the separate volume filed herewith.

Questions Presented.

These causes involve the following questions (the determination of which in the *affirmative* by the Supreme Court of California constitutes a *taking* of the property of petitioners *without due process of law*), to wit:

(1) Does an appropriator of water from a stream owe any *duty* to a downstream proprietor thereon, or in the lake constituting its natural outlet and place of discharge, *to divert*, in any amount whatsoever, water that, in its *natural course*, would reach such downstream proprietor?

(2) Is a municipal appropriator of water (petitioner City) from a stream (Owens River) emptying into a saline lake (Owens Lake), its sole natural outlet, *obligated*, at the appropriator's expense or peril, to divert from the stream, and *dispose of*, surplus water *in excess* of the appropriator's needs up to the capacity of its Aqueduct, its reservoirs, and its spreading grounds,—such appropriator having provided Aqueduct and reservoir capacity, beyond that hitherto required, to meet the future increase in the demands supplied by it,—in order to prevent the natural discharge of such surplus water into said lake and thereby to benefit a manufacturer of products from the lake brines by rendering such brines *more profitably available*,—the expense of such disposal being inclusive not only of added operational costs for spreading, storage, transportation and spilling of such surplus water, but also of new capital outlay for the acquisition of flowage

rights in lands and in a river, each in a watershed other than that of the stream of such water's origin?

(3) Is said manufacturer *entitled to rely* upon the appropriator's diversion and disposal of such surplus water in a year (1937) when the stream flow becomes greater than normal,—following an 18-year period of unprecedented drought (1919-1936) and the reduction of the stream flow consequent thereon,—because said saline lake became *dry* and relatively *dry*[9] due to the apropriator's then diversions to supply current demands, which diversions, though *less* in volume than in the period here in question (1937), left little or no *residual* water in the stream to flow down its channel in the course prescribed by nature and thence discharge into said saline lake, its natural outlet?

(4) Does the inhibition upon the "*waste* of water", contained in Article XIV, Section 3, of the constitution of the State of California, obligate said appropriator *to prevent* the *surplus* stream flow,—*i. e.*, the water not needed for the uses served by the appropriator,—from discharging through its natural channel into said saline lake, and thereupon to dispose of such surplus by wasting the same *artificially*, in order to render the mineral content of the brines in said lake more profitably available to such manufacturer?

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[9]That is to say,—"dry" except for the brines permeating and underlying the salt cake exposed by the recession of surface water.

(5) Can such an artificial conduit as the Los Angeles Aqueduct,—the sole purpose and function of which is to supply the demands for water within a municipality,—ever acquire the *status* of the *channel* of the stream from which it diverts *in substitution* for its extant natural channel, or have attached to it any of the rights inherent in a natural channel and stream; and does such an artificial conduit, by reason of its performing the single function of transporting water by gravity to serve *specific and limited demands,* in volumes fluctuating but gradually increasing, become impressed with the other functions served by a natural stream channel giving rise to *corresponding rights* in the public, and in proprietors on either such artificial conduit or on the natural channel?

In the brief appended, not only are the foregoing jurisdictional questions developed, but attention is invited to certain additional *non*-jurisdictional points decided by the Supreme Court of California in contravention of general law.

The Crucial Ruling of the Supreme Court of California.

Under a total misapprehension of the true state of facts, as exhibited by the *uncontradicted evidence* relied upon by respondent (the same being petitioners' Aqueduct records), the Supreme Court of California misapplied (as, indeed, it could have hardly avoided doing in view of such misapprehension), an undoubted rule of law,—namely, that "one who makes expenditures in reliance on long-continued diversion of water by another has a right to have the diversion *continued,* if his investment would otherwise be destroyed" [143 Pac. (2d) 15] and "should receive as much protection as if the condition were *natural*" [143 Pac. (2d) 16.] This rule said Court applies to a supposititious state of facts (in part inaccurate and utterly fragmentary,—*i. e.,* divested of the controlling factors) which, as stated in its opinion, is as follows:

(a) "From 1919 to 1937 [The City of Los Angeles] diverted into [the Aqueduct] virtually *all* of the flow of the Owens River."

(b) "As a result, the lake *dried up.*"

(c) Thereupon the lake's "subsurface became a crystalline cake impregnated with brines containing valuable chemicals."

(d) The "*extent* of the flow [into Owens Lake] was determined by the manner in which [petitioners'] operated [their] Aqueduct."

(e) "Below [Tinnemaha] dam, the water, which flowed through its natural channel until it reached Intake, "*could be directed* into the Aqueduct proper by means of [petitioners'] diversion dam, or into Owens Lake if the gates in the dam were opened."

(f) "On February 6, 1937, * * * [petitioners] opened the gates at Intake [and thereafter] continued to direct the water into the lake intermittently until July 1, 1937," flooding the lake with "approximately 50,000 acre feet of water." [143 Pac. (2d) 15.]

The Points of Divergence Between the Actual and Undisputed Facts and the Supposititions State of Facts Constituting the Basis of the Decision of the Supreme Court of California.

Succinctly, the recital of the *supposed* facts upon which the State Court proceeded in rendering the decision and judgment whereof review is sought, exhibits the following *erroneous* apprehensions of the true situation:

(1) The natural flow of Owens River is treated by the court as a *constant*. The State Court selects the period of *drought* (1919-1936), in disregard of all other years, as correctly exhibiting a permanent *total* depletion of the river flow by petitioners' diversions. In so *disregarding* the prior historic stream flow records and in considering only the effect of petitioners' diversions upon the *reduced flow* of the river during the drought, the court proceeds as though the river flow were practically constant in volume. Based on this misconception, the court concludes that, since petitioners so totally depleted that flow during the drought as to leave *no* residual water in the river channel below Intake and hence caused the drying up of the lake, petitioners must not only *continue* diversions, but make them on a *scale* sufficient to preserve that condition.

(2) The State Court thus loses sight of the fact that the discharge from Owens River into Owens Lake,—*i. e.*, the *residual* water left in the river channel,—is the *resultant* of two factors, (a) the natural stream flow at Intake, and (b) petitioners' diversions therefrom. The fact is that, far from being a constant, the natural flow

of Owens River exhibits the widest fluctuations, both seasonal and cyclic, the annual maximum having been attained in 1906 (468,000 acre feet), and the minimum during the 18 years' drought when the aggregate of such flow for the *two years* 1930-1931 (245,000 acre feet) was 223,000 acre feet *less* than in the one year 1906), and 44,000 less than the 290,000 acre feet of the *one year* (1937) here in question. [Plff. Exhibit 1, pp. 21-23, and Plff. Exhibit 53.]

(3) The State Court treats petitioners' diversions as the *sole cause* of the drying up of the lake, in total disregard of the low stage of the river during the drought as a contributing cause. In point of fact, petitioners' diversions in each year during the drought and from February to June, inclusive, in each such year, were *less* than in 1937. Hence, the incursion of water into Owens Lake in 1937 was not due to any *curtailment* of diversions by petitioners, but to the almost three-fold *increase* in the river flow[10] and the destruction thereby of the *balance* between river flow and diversions that had prevailed during the prolonged low stage of the river.

(4) The State Court fails to note that petitioners' diversions *in 1937* were the then *highest on record* and hence that the termination in that year of the prior *dry* condition of Owens Lake was due,—not to any deviation by petitioners from the standard of conduct established

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[10]As compared with the three lowest annual natural river flows during the drought (1924, 1930 and 1931).

by their diversions from 1919 to 1936,—but to an increase in the river flow from the lowest on record to more than the average flow during the prior history of the Aqueduct.

(5) The State Court fails to note that, with such an increase in 1937 in the *river flow*, it was an utter physical *impossibility* for the lake discharge to remain as low as during the drought, notwithstanding an increase of petitioners' diversions in that year, since such increase was *not* commensurate with the increase in the river flow.

(6) The State Court to the contrary notwithstanding, "the lake's subsurface" did not "become a crystalline cake, impregnated with brines containing valuable chemicals" upon the drying up of the lake. It was the brines that were "subsurface", *i. e.*, beneath the salt cake. Over them the "crystaline cake" had been formed through a period not definitely established, and such brines were rendered more profitably available by the recession of the lake water.

(7) As indicated in paragraphs numbered (1) to (5) last above, the State Court is in error in declaring that the "*extent* of the flow into Owens Lake] was determined by the manner in which [petitioners] operated [their] Aqueduct." On the contrary, the lake discharge was due to the imbalance in 1937, produced by natural causes, between the flow of Owens River and the volume of petitioners' *diversions* therefrom. The State Court thus fails to note that in 1937 petitioners made *no* contribution to this imbalance by ceasing or curtailing their diversions from

the river,—the fact being that those diversions were then *higher* than in any prior year or in the months from February to June, inclusive, of any prior year.

(8) In correctly declaring that Tinnemaha Dam was constructed across Owens Valley, the State Court apparently considers the dam as collecting and concentrating in Owens River water that *would not otherwise* reach it. The undisputed evidence is that said dam has *no* effect upon the volume of the flow in the river. All the natural drainage of Owens Valley reaching the dam site flowed across that site before the dam was built, and the dam's sole effect upon such flow is to deflect it along the dam's upper face and thus into the channel of Owens River somewhat earlier than it would otherwise reach the same. If the dam were not there, the whole of this drainage water would reach the river well above Intake. [Rep. Tr. p. 1195.][11]

(9) The State Court correctly treats Tinnemaha Reservoir's function as that of *regulating* the river flow; but it later declares that petitioners "could easily have found an outlet for the *surplus* water instead of causing it to flow into the lake," [143 Pac. (2d) 16] and that they "could have stored some of this water in Tinnemaha Reservoir for later release down the Santa Clara River or onto the

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[11]Anyone rightfully damming a stream to avail of its water to any extent may allow the surplus water to overflow or otherwise discharge into the channel of the stream below the dam [*Bruton v. Carolina Power & Light Co.*, 217 N. C. 1, 6 S. E. (2d) 822, at 828].

Mojave Desert" [*Id.*, p. 15],— the former almost 200 miles below, and both in foreign watersheds. So to employ Tinnemaha Reservoir for storage would be to *destroy* its normal *function* at the very time when such regulation is demanded, *i. e.*, during peak flows of the river. This the State Court ignores. Moreover, it further ignores the uncontradicted showing by petitioners that they have *no flowage rights* either in the Santa Clara River or on the Mojave Desert; and thus (in addition to ruling that, at their peril, petitioners must use that regulating reservoir for a purpose foreign thereto and the excess capacity of their other facilities for the transportation, storage and spreading of surplus water not needed),—that Court imposes on them the necessity of acquiring flowage rights,—all to the end that respondent's operations on Owens Lake may be rendered *more profitable.*

(10) The State Court, without considering the essential function of the *outlet gates* in petitioners' diversion dam at Intake, declares that those gates "did not dispel the impression of *permanence* [of diversions by petitioners], for it was evident from the continued dryness of the lake that they *were* kept closed." [143 Pac. (2d) 16.] Indeed, those gates were kept closed during 9 out of the 18 years' drought for the obvious reason that petitioners were then diverting *all* of the river flow and there was *no* surplus to pass through the outlet gates if they had been opened. In the other 9 years of the drought, the gates were *opened* for an aggregate period a few hours short of 99 days. It is the obvious *function* of such gates,—and

not their actual *operation*,—that "destroys all idea of *permanence*"[12] in respect of petitioners' diversions. No appropriator installs such costly and permanent structures and the mechanical apparatus to open or close the same at will, or (having installed them), operates the same, *except* for the purpose of discharging water therethrough,—most usually surplus water in excess of the needs of the appropriator.

(11) The State Court is correct in declaring that petitioners opened the outlet gates in their diversion dam intermittently from February to June, inclusive, 1937. In so declaring, however, that Court overlooks the facts not only that the gates were so operated to permit surplus water in excess of petitioners' needs continuing its natural flow down the natural channel of Owens River to its natural point of discharge in Owens Lake, but also that the earlier of these openings were due to ice jams in the Aqueduct canal between Intake and Haiwee Reservoir that prevented the operation thereof.

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[12]*Mitchell Drainage District v. Farmers' Irrigation District*, 127 Neb. 484; 256 N. W. 15, at 22.

The Fundamental Errors of the Supreme Court of California.

The fundamental errors of the State Court in respect of the *jurisdictional* points here presented derive from its treatment of the dry condition of Owens Lake that developed during the dry cycle of years as having been caused *solely* by petitioners' diversions. Although in 1937 those diversions continued in greater volume than ever before, they *could not* have the effect of preserving the lake's dryness because of the still greater increase in the river flow over the direfully low stage to which it had declined during the drought. The lake discharge is the *residual* water left in the river after petitioners' diversions therefrom, and, assuming petitioners' diversions to be constant, this residual must necessarily fluctuate with the river flow.

In short, having given *no* consideration to the *absolute volume* of petitioners' diversions in 1937 and in the months from February to June, inclusive, of that year, in comparison with the absolute volume of their diversions in prior corresponding periods, but looking only to the *effect* of those diversions upon the lake bed during the years of *drought*,—*i. e.*, the dry condition of Owens Lake,—and the termination of that condition with the recurrence in 1937 of a *wet year* and the concomitant heavy river flow, the State Court could not but have fallen into further error in invoking and applying the rules upon which its decision proceeds,—namely, "that one who makes substantial expenditures in reliance on long-continued diversion of water by another has a right to have the diversion *continued* if

his investment would otherwise be destroyed," and that "a change in the flow of a stream that appears to be *permanent* usually leads to costly adjustments by those interested, as they come to regard the *artificial* condition as *permanent* [and] it is therefore reasonable that they should receive as much protection as if the condition were *natural.*' [143 Pac. (2d) 15-16.]

The rules just referred to contemplate a *dis*continuance by the diverter of previous long-continued diversions by him constituting the type of alteration in the natural stream flow that is effected by means of an *artificial* channel serving,—*not* a specific and limited purpose, as does the Los Angeles Aqueduct,—but *all* the purposes of the *natural* channel in substitution therefor, either total or *pro tanto.* In such a case, neither discontinuance of the flow in the substituted channel, nor restoration of the flow to the original channel, is permissible to the injury of those who have adjusted themselves or made investments in reliance on the permanence of such substitution. But the Los Angeles Aqueduct serves *only* a specific and limited purpose (the *municipal needs* for water) which is determinative of the volume of the diversions thereinto from time to time, in step with the *fulfillment* of that purpose, and correspondingly determinative of the *extent* of the *use* of the Aqueduct's *capacity*, whereon alone could respondent place any reliance whatsoever. Hence, there is *no* factual feature of these causes that can serve to render such rules operative.

Moreover, even if these causes presented a case of channel substitution (which, emphatically, they do *not*), such substitution, instead of being total, could be at most a *pro tanto* substitution measured—not by the Aqueduct's *capacity*,—but by petitioners' *past use* of that capacity; and as there was neither cessation nor curtailment by petitioners of their diversions in 1937 or in the months of that year here in question as compared with their diversions in any prior corresponding period, there was *no break* in their permanence in point either of time or of volume. The artificial condition produced by petitioners was the continuous abstraction, year by year, of certain absolute volumes of water from the river and the corresponding reduction in the residual flow left in the river to pursue its natural course into Owens Lake. This artificial condition not only *continued* throughout 1937, but, as petitioners' diversions in that year and in the crucial months thereof were larger than in any prior corresponding period, such artificial condition was then *accentuated* instead of ceasing or being diminished. The whole difficulty of the State Court is in confusing the dry condition of the *lake* during the drought (due to the decrease of the river flow and the consequent decrease in the residual water), with the only artificial condition produced by *petitioners*, namely, the *abstraction* from year to year of definite volumes of whatever flow *nature* presented in the river at Intake,—such abstraction in 1937 and in the crucial months thereof being greater than in any prior corresponding period.

Petitioners' Supposed Opportunities for Disposing of Surplus Water.

No large scale *disposal* of surplus water can be made without large capital and operating *outlays* by petitioners and also the *employment* of their existing facilities either to an extent not needed by them, or, in the case of their regulating reservoir, for a purpose (storage) in suspension of its normal *regulatory* use when flow regulation is alone necessary.

Reasons Relied on for the Issuance of the Writs.

So long as water runs and the decision and judgment of the State court herein stands, petitioners will be subjected to penalization in damages, in sums vastly greater than those awarded in the causes at bar, whenever *precipitation* in the watershed of Owens River and Owens Lake produces stream flows in excess of the diversions necessary to supply the current *demands* (including carryover storage) served by petitioners. Already, up to 1942, claims in that behalf have been made against petitioners in the aggregate sum of $2,560,258.17 (in addition to that upon which the judgment herein was entered), and suits on such claims are pending to recover damages in the total amount of $1,543,603.96.

It requires no argument to demonstrate that the decision of the State court, in imposing such outlays and such additional, unneeded and functionally destructive uses of its facilities, for respondent's benefit by rendering the lake brines still more profitable than petitioners' diversions have already made them, constitutes a taking of petitioners' property *without due process of law* within the meaning of the 14th Amendment.

By its decision and judgment herein (unless the same be reversed by this court), the Supreme Court of California will have established the following as principles of law:

(1) That an appropriator of the water of a stream is obligated to divert therefrom water for which he has *no* beneficial use, whenever he has unused conduit *capacity* sufficient to enable him so to do, and to dispose of this unusable water at his own expense, if such action will *profit* a downstream proprietor.

(2) That an appropriator who has diverted water over a series of years in amounts uniformly determined by the *demands* served by him, using only *part* of the capacity of his conduit built in anticipation of the growth of those demands, is *obligated*,—not merely to *continue* diversions measured either by his current demands or by his maximum prior diversions,[13]—but to *increase* his diversions, for the profit of such downstream proprietor, by such amount in excess of said demands and of his prior diversions as, within his *surplus* conduit *capacity*, may be naturally flowing in the stream;

(3) That the inhibition upon the "waste of water" contained in Article XIV, Section 3, of the Constitution of California, forbids an appropriator to *permit* the *natural discharge* of water into a saline lake constituting the

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[13]Petitioners do *not*, of course, conceded that an appropriator, merely as such, is under *any* obligation to a downstream proprietor to divert water at all or in any amount, such appropriator's right being that of a mere *licensee*,—to be availed of or not at his will. If the rule were otherwise, however, the extent of his obligation (under that hypothesis) would be measured by his *prior diversions*,—*not* by the *capacity* of his diversion facilities.

stream's natural outlet, whenever such discharge would render its mineral deposits *less profitably available* to a proprietor on such lake.[14]

(4) That an appropriator of water, by diverting annually over a series of years (1919-1936), a net minimum (1924) of 144,000 acre feet,—126,000 from Owens River and 18,000 from lateral streams below,—and a net maximum (1927) of 265,000 acre feet,—250,000 from Owens River and 15,000 from said lateral stream [Plff. Exhibit 1, pp. 63, 43],— becomes obligated to a downstream proprietor to divert thereafter (1937) 368,000 acre feet [Deft. Exhibit Z 8], *i. e.*, 97,000 in excess of that year's *actual* diversions, the then highest on record (271,000 acre feet, 260,000 from Owens River and 11,000 from said lateral streams),—he having no beneficial use for such excess water,—because his facilities are of a capacity to enable him so to do, and that he becomes further obligated to provide additional means of disposing of such excess [Plff. Exhibit 1, pp. 64, 44], if such downstream proprietor's *access to natural resources* is thereby rendered more profitable. That is to say,—said downstream proprietor thereby acquires, as against such appropriator, a right,—*not* measured by, nor commensurate with, the *conduct* of the appropriator creating that

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[14]The California constitutional inhibition upon the "waste" of water has heretofore been held to have no reference to natural discharges from streams into saline lakes or into the Pacific Ocean. See,

Meridian, Ltd. v. San Francisco, 13 Cal. (2d) 424, at 444-46;

City of Los Angeles v. Aitken, 10 Cal. App. (2d) 460, at 474; and

City of Elsinore v. Temescal Water Co., 36 Cal. App. (2d) 116, at 130.

right,—but *transcending* the same by at least the difference between his current needs (or his maximum prior diversions) and the natural stream flow that can be accommodated within the capacity of his conduit.

(5) That said appropriator, in order to *dispose* of such surplus water must, at his peril, *acquire* the necessary reservoirs and/or flowage rights in land and/or in any available stream, at his own expense, and utilize the same and the excess capacity of his conduit to effect unneeded storage, both surface and underground, *exceeding* any prior storage practiced by him, and also must *waste* water both by the means indicated and by indirect discharge into the sea,—all for the profit of such downstream proprietor.

As will be developed in the brief accompanying this petition, every one of the foregoing propositions, enunciated and implicit in the decision and judgment whereof a review is sought, would, in respect of their several subject matters, change the law of California as established, *without prior dissent*, by the decisions of the Supreme Court of that State.

Conclusion.

Your petitioners present herewith a transcript of the record of said causes, duly certified, and, as part of this petition, a brief more fully presenting their views upon the questions involved and their reasons for believing those questions to be of sufficient importance to justify the granting of said petition.

For the reasons and upon the grounds herein and in said brief set forth, your petitioners pray that there be

issued out of this Honorable Court its said writs of certiorari directed to the Supreme Court of the State of California; that the said decision and judgment of the said Supreme Court of the State of California may thereafter be reversed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray.

THE CITY OF LOS ANGELES, a municipal corporation,

and

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, a department created under the Charter of said City,

Petitioners.

By RAY L. CHESEBRO, *City Attorney;*

S. B. ROBINSON, *Chief Assistant City Attorney for Water and Power;*

SAMUEL POORMAN, JR., *Assistant City Attorney;*

A. E. CHANDLER, *Special Counsel;*

By SAMUEL POORMAN, JR.,

Counsel for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1943.

(Consolidated Causes; California Supreme Court, L. A. No. 18066)

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners.

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent,

(Superior Court No. 3783)

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners.

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent,

(Superior Court No. 3817)

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

The summary statement of the facts in these causes as set forth in the foregoing petition for writs of certiorari suffices for the presentation of the *jurisdictional* matters

upon which said petition is grounded, and accordingly reference is made to that statement.

Certain *non*-jurisdictional points of general law will require brief mention of certain additional facts bearing thereon.

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under the *due process* clause of the Fourteenth Amendment to the Constitution of the United States, upon the ground that the *effect* of said decision and judgment of the State court whereof review is sought is to take from petitioners without due process of law property owned and operated by petitioners in their *proprietary capacity* for supplying public utility services of water and electricity within The City of Los Angeles and immediately adjacent territory. Fully recognizing that a city's "tenure of property, derived from the State for specific public purposes," is not accorded unlimited constitutional protection, but is so far subject to State control that the State may require the same to "be applied to other *public* uses of the municipality than those originally designated" [*Commissioners v. Lucas*, 93 U. S. 114], nevertheless as declared in the case cited, "property, derived by [municipalities] from *other sources* [than the State], is often held, by the terms of its grant, for special uses, from which it *cannot* be diverted by the legislature. In such cases, the property is protected by *all* the guards against legislative interference possessed by individuals and private corporations for their property." [*Idem.*, p. 115.]

"In general it may be conceded that [a municipal corporation] can own *private* property, not of a public or governmental nature, and that such property may be

entitled, as is said, "to *constitutional protection.*" [*Worcester v. Worcester Street Railway Co.*, 196 U. S. 539, at 551.]

See also,

Montpelier v. East Montpelier, 29 Vt. 12, at 19;

Mount Hope Cemetery v. City of Boston, 158 Mass. 509, 33 N. E. 695;

State of Montana v. Holmes, 100 Mont. 256, 47 Pac. (2d) 624, at 629;

1 Dillon on Municipal Corporations (5th ed.), Secs. 109-110 (pp. 181-184), Sec. 132 (pp. 236-239).[1]

The cases cited to the point that petitioners' *proprietary* property enjoys "constitutional protection" are no less apposite because they deal with attempted legislative interference with municipal property of that character, while in the causes at bar the interference complained of is judicial.

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[1]The case of *City of Trenton v. State of New Jersey*, 262 U. S. 182, does not infringe upon the doctrine of the cases cited in the text. In the *Trenton Case* the state's power to exact from a municipality a license fee or charge for the diversion of water from a public stream for the use of the city's inhabitants, was upheld upon the ground that the right to take such water could only be acquired, directly or indirectly, by grant *from the state*. Accordingly, the municipality as a mere agency of the state holds property of this character subject to state regulation and the imposition of such charge as the state may see fit to impose in the *state's* own favor.

In the causes at bar, on the other hand, the State of California, through its highest court, in effect requires petitioners to devote funds and property derived,—*not* from the State,—but from the taxpayers and public utility consumers of Los Angeles, to uses *foreign* to the purpose to which such property and funds are devoted, for the *profit* of a *private* corporation operating upon proprietary lands of the state. (See 262 U. S. 191.) In the damages awarded the State has no share, such damages being the penalty exacted from petitioners for having failed to dispose of the natural flow of the Owens River in excess of the demands served by them.

The Extent of the Beneficial Use of Water Actually Made by an Appropriator Is the Measure of His Right Thereto and No Duty Can Devolve on Him to Divert Water to Which He Has No Right.

Petitioners' rights to the water of Owens River, as well as of the other streams in the same watershed, were acquired under Section 1411 of the Civil Code of California which declares:

> "The appropriation must be for some *useful* or *beneficial* purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the *right* ceases."

As said in 1 Weil on Water Rights in the Western States (3rd ed. 1911), Sec. 478:

> "Actual use [by the appropriator] has become the sole measure of right."

In *Smith v. Hawkins*, 120 Cal. 86, at 88, the appropriator's right is declared to be *limited* "to such quantity, not exceeding the capacity of the ditch, as the appropriator may *put* to a *useful* purpose"; or as phrased in *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82, at 86, to "the amount which [the appropriator] had been *actually* taking and *applying* to a *beneficial* use."

See, also,

Senior v. Anderson, 115 Cal. 496, at 503-504;
Hufford v. Dye, 162 Cal. 147, at 153 and 159.

An appropriator is a mere *licensee* of the state whose right to water is limited to the quantity applied to beneficial use whether made, as formerly, under the pertinent provisions of the Civil Code or, as at present, under the Water Commission Act of California. [*Tulare Water Co. v. State Water Commission*, 187 Cal. 533, at 536.] Section 20 of that act is merely declaratory of the rule enunciated *without dissent* in the prior decisions of the Supreme Court of California, namely:

> "All permits and licenses for the appropriation of water * * * shall be effective for such time as the water actually appropriated [thereunder] shall *actually* be used for the *useful* and beneficial purpose for which such water was appropriated, but no longer; [and upon the cessation of such beneficial use the Water Commission] may revoke said permit or license and declare the water to be *un*appropriated and open to further appropriation * * *."

"Actual diversion (the taking of possession) creates the right; actual *use* (the amount in possession) *measures* the right." [*Simons v. Inyo Cerro Gordo Co.*, 48 Cal. App. 524, at 537-538.]

See *California Pastoral, etc., Co. v. Madera Canal and Irrigation Co.*, 167 Cal. 78, citing many of the authorities and declaring that "in so far as the diversion exceeds such reasonably necessary amount [for the purpose for which the water is in fact appropriated], it is *contrary* to the *policy* of our law and unauthorized, is 'a taking *without right*' (*Thayer v. California Development Co.*, 164 Cal. 117 [128 Pac. 21], and can confer no right no matter for how long continued."

Petitioners, as Appropriators of Water, Owe No Duty to Respondent, a Downstream Proprietor, to Prevent the Natural Flow of Owens River, in Excess of Their Needs, Flowing Down the Natural River Channel and Emptying Into Owens Lake, Its Natural Outlet, Either (1) By Operating Their Diversion and Storage Works to Capacity, or (2) By Wasting Water, or (3) By Conserving Water Through Irrigation or Spreading, or (4) By Using Their Regulating Reservoir for Storage.

Since any *surplus* water in the Owens River watershed in excess of that necessary to supply petitioners' current *needs* (including reasonable carry-over storage), is subject to appropriation, as of right, by others, petitioners cannot possibly be under an *obligation* to take and dispose thereof by wasting the same *artificially,—i. e.*, otherwise than by its discharge into Owens Lake as nature has decreed by making Owens Lake the outlet of Owens River. Petitioners have neither obligation nor option to take water for which they have *no use*. The limitation on the appropriator's right theretofore imposed *without exception* by the decisions of the highest court of California, was carried into the State Constitution in 1928 by the amendment adopting Section 3 of Article XIV, which declares that the amount of water that an appropriator may at any time take is limited to such as is "reasonably required for the *beneficial use* to be served," and that such right does "*not* extend to the waste or unreasonable use * * * of water." The right to any excess, in Pothier's phrase, "belongs to the 'negative community'" [1 Weil on Water (3rd ed.), Sec. 7]. How, then, can the diversion and disposal of this *excess* water,

to which petitioners have *no* right, be lawfully held to constitute a burden that they must bear in the interest and for the *profit* of a downstream proprietor such as respondent? To say that at the same time one has *no right* to take water and yet is *obligated* to take it, is to pose a legal impossibility.

The decision of the State Court nevertheless imposes upon petitioners an obligation (1) to take water in excess of their *needs* because, in anticipation of the City's growth and the consequent increase in the demands served by them, they provided *excess* aqueduct capacity to meet that increase over a long future period (fifty years), and also (2) to bear the added *operational expense* of handling and storing this excess water, and further (3) to make the necessary *capital outlay* in acquiring *flowage* rights in the Santa Clara River and on the Mojave Desert to dispose of such excess by wasting it, and finally (4) to suspend the designed function of Tinnemaha Reservoir, namely, the *regulation* of the flow of Owens River during high water,—*i. e.*, at the *only* times when such regulation is imperatively necessary. Such four-fold obligation,—in nowise analogous to flood control for public benefit,—is to enable a private corporation to avail of and process brines from Owens Lake *more profitably* than would be possible if the natural flow of Owens River into that lake were *not* artificially prevented. Petitioners have done nothing to hinder or curtail the operations of respondent or to detract from such advantages as *nature* has afforded on Owens Lake. Quite the contrary. The marked *natural depletion* of the river's flow during the drought in conjunction with the Aqueduct diversions (though then far *less* than in 1937), resulted in a *subsidence* of the *water level* of the lake

by some 20 feet. In 1937, that level rose approximately 2½ feet, notwithstanding petitioner's *greater* diversions in that year and in the months from February to June, inclusive, of that year, than in any *prior* corresponding period,—a circumstance due entirely to the increase in the *river flow* as compared with that during the period of *drought* (1919-1936) when the lake became relatively dry.

Petitioners' diversions in 1937 were 6,000 acre feet *greater* than those in the maximum prior year, and in the months from February to June, inclusive, 1937, were 10,000 acre feet *greater* than in the maximum prior corresponding period. Such diversions throughout the history of the Aqueduct have been both from Owens River and (in much less volume), from the lateral streams below Intake. In 1937, petitioners diverted a total of 271,000 acre feet (260,000 from Owens River and 11,000 from said lateral streams), while in the months from February to June, inclusive, of that year, such diversions aggregated 128,000 acre feet (126,000 from Owens River and 2,000 from the lateral streams). The only prior year in which petitioners' diversions were in volume at all approaching these figures was 1922, when the total diversions for the year were 250,000 acre feet,[2]—*i. e.*, 21,000 less than in 1937,—the

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[2]The figures indicating the aggregate volumes of water diverted represent the inflow into Haiwee Reservoir. The diversions from Owens River are those at Intake and the difference between these respective figures represents the net diversion from lateral streams over and above all losses and discharges from the Aqueduct canal above Haiwee Reservoir. In 1922, 15,000 acre feet more water was diverted at Intake than reached Haiwee Reservoir, not necessarily indicating that there were no diversions from the lateral streams but rendering it probable that, notwithstanding such diversions, there were transmission losses and discharges from the Aqueduct canal in excess thereof.

whole of which was from Owens River, while in the months from February to June, 1922, the diversions were 121,000 acre feet,—*i. e.*, 7,000 less than in 1937,—of which 116,000 were from Owens River (10,000 less than in 1937), and 5,000 from lateral streams.

The two following Tables exhibit in detail the pertinent data.

DATA IN EVIDENCE RELATIVE TO STREAM FLOW IN OWENS VALLEY WATERSHED, PETITIONERS' DIVERSIONS AND DISCHARGE INTO OWENS LAKE

Table I—By Calendar Years in Acre Feet, using even thousands (indicated by M), and omitting the three digits to the right from each item.

Year	a Flow of Owens River at Charlies Butte Pltf. Ex. 1 p. 21-22 M	b Flow of Lateral Streams Below Intake Def. Ex. Z 11 M	c a+b Total Water Available M	d Diversion into Haiwee Pltf. Ex. 1 pp. 43-46 M	e c–d Total Residual Water Not Diverted M	f Diversions from Owens River at Intake Pltf. Ex. 1 pp. 43-46 M	g e–f Residual Water of Owens River Not Diverted M	h Discharge from Owens River to Lake Pltf. Ex. 1 pp. 118-121 M	i e–h Flow of Owens River Withheld from Lake M	j Discharge from Lateral Streams to Lake Def. Ex. 1 p. 138 M	k Flow of Lateral Streams Withheld from Lake M
1906	468	141	609								
1907	405	75	480								
1908	217	50	267								
1909	339	105	444					342	– 3		
1910	253	46	299					234	19		
1911	440	86	526					413	27		
1912	213	47	260					206	7		
1913	174	44	218					121	53		
1914	391	97	488	42	446	117	274	370	21		
1915	271	55	326	36	296	101	170	223	48		
1916	384	94	478	96	382	129	255	308	76		
1917	288	56	344	124	220	151	137	186	102		
1918	260	45	305	200	105	207	53				
1919	198	39	237	194	43	177	21				
1920	171	50	221	205	16	173	– 2				
1921	166	42	208	190	18	167	– 1				
1922	294	59	353	250	103	265	29				
1923	170	39	209	194	15	176	– 6				
1924	119	38	157	144	13	126	– 7				
1925	136	52	188	195	– 7	144	– 8				
1926	165	46	211	181	30	155	10				
1927	244	52	296	265	31	250	– 6	20	224		
1928	169	59	228	215	13	174	– 5	8	161		
1929	141	71	212	194	18	144	– 3	2	139		
1930	225	52	277	251	26	226	– 1	3	222		
1931	220	54	274	247	27	218	2	1	219		
1932	224	53	277	251	26	224	0	2	222		
1933	229	41	270	247	23	238	– 9	2	227		
1934	194	66	260	235	25	199	– 5	2	192		
1935	244	44	288	258	30	245	– 1	6	238		
1936	214	58	272	222	50	211	3	14	200	1	57
1937	293	75	368	271	97	260	33	54	239	7	68

DATA IN EVIDENCE RELATIVE TO STREAM FLOW IN OWENS VALLEY WATERSHED, PETITIONERS' DIVERSIONS AND DISCHARGE INTO OWENS LAKE

Table II—By Periods from February to June, inclusive, in Acre Feet, using even thousands (indicated by M), and omitting the digits to the right from each item.

Year	a Flow of Owens River at Charlies Butte Piff. Ex. 1 p. 21-22 M	b Flow of Lateral Streams Below Intake Def. Ex. Z 11 M	c a+b Total Water Available M	d Diversion into Haiwee Piff. Ex. 1 pp. 43-46 M	e c–d Total Residual Water Not Diverted M	f Diversions from Owens River at Intake Piff. Ex. 1 pp. 43-46 M	g e–f Residual Water of Owens River Not Diverted M	h Discharge from Owens River to Lake Piff. Ex. 1 pp. 118-121 M	i a–h Flow of Owens River Withheld from Lake M
1906	126	58	184						
1907	142	38	180						
1908	78	24	102						
1909	135	61	196					134	1
1910	109	27	136					99	10
1911	174	51	225					165	9
1912	72	25	97					91	–19
1913	70	19	89					45	25
1914	153	59	212	16	196	45	108	158	– 5
1915	113	30	143	22	121	56	57	90	23
1916	177	57	234	32	202	30	147	163	14
1917	129	31	160	32	128	37	92	109	20
1918	122	22	144	78	66	83	39	46	76
1919	100	20	120	88	32	86	14		
1920	72	27	99	92	7	74	– 2		
1921	61	20	81	78	3	63	– 2		
1922	124	34	158	121	37	116	8		
1923	61	17	78	72	6	58	3		
1924	48	15	63	60	3	51	– 3		
1925	44	22	66	67	– 1	46	– 2		
1926	74	12	86	82	4	77	– 3		
1927	102	30	132	115	17	105	– 3	10	92
1928	81	20	101	94	7	83	– 2	6	75
1929	59	28	87	87	0	62	– 3	1	58
1930	101	34	135	123	12	101	0	1	100
1931	96	23	119	109	10	95	1	1	95
1932	92	29	121	110	11	93	– 1	1	91
1933	98	18	116	109	7	108	– 2	1	97
1934	89	21	110	102	8	92	– 3	1	88
1935	100	21	121	103	18	96	4	4	96
1936	102	32	134	108	26	101	1	11	91
1937	151	45	196	128	68	126	25	44	107

It will be noted that out of the total water available in the watershed, petitioners' diversions had the effect of withholding from Owens Lake a *greater* volume of water in 1937 than in any prior year, and of curtailing the lake discharge in a degree incomparably *greater* than had been accomplished by the uses of water in Owens Valley for irrigation, *etc.*, prior to the Aqueduct's operation. Thereby the brines in Owens Lake were rendered more profitably available than they otherwise would have been. The real ground of respondent's complaint is that petitioners did *not* render them *still more so* in 1937, (a) by increasing their diversions, from the record high established that year, up to the *capacity* of the Aqueduct, (b) by disposing of this excess water through means *not* then nor now available to petitioners, (c) by discontinuing the *function* of Tinnemaha Reservoir as a stream regulator pending such disposal, and (d) by spreading water on their lands in Owens Valley to effect *unneeded* underground storage thereof.

A. Diversion by an Appropriator, However Long Continued, Cannot Cause a Watercourse to Lose Its Status as Such.

In *Lindblom v. Round Valley Water Co.*, 178 Cal. 450 it is said:

> "If North Canyon was, under natural conditions, a watercourse, it would not lose that character by a mere diversion, however long continued, although the rights of the riparian owner might be subordinate to those of the appropriator." [178 Cal. 452.]

In the causes at bar, the uncontradicted evidence is that the *original* and *only* channel of Owens River below Intake has at all times continued as such; that water has flowed therethrough into Owens Lake in every year; and that in every year except nine (not all consecutive) of the 18 years' *drought,* this water included (in addition to the make of the stream below Intake), so much of the natural flow of the river that at Intake was *excluded* by petitioners from the Aqueduct because in excess of their then needs therefor. If, however, the fact were otherwise, and no water had flowed down the channel in Owens River below Intake, that part of its channel would *not* have lost its character as a natural channel but its status as such would have continued. This point was directly in issue in the *Lindblom Case, supra,* and the court's ruling therein conforms strictly to the statement just made.

Authorities Denying the Existence of Any Obligation on the Part of an Appropriator of Water to Divert or Dispose of Any Volume of the Natural Stream Flow in Excess of That Necessary to Supply His Beneficial Uses.

The cases cited *infra* present a single circumstance in common, namely, the loss by one party of an *incidental benefit* by him previously derived from an *artificial* change wrought by another affecting or causing a flow of water. The only difference between them and the causes at bar,—a difference wholly favorable to petitioners,—is that here respondent did *not* lose the incidental benefit by it derived from petitioners' abstractions of water from Owens River. On the contrary, respondent received such incidental benefit in *fuller measure* in 1937, and in the months from February to June, inclusive, of that year, than in any prior corresponding period.

Classification of the Cases Relied on by Petitioners.

The cases most closely in point fall into one or other of the following three main classifications:

Class A. Case in which a person entitled to water, or the use of water, had *not* taken or used the same, thereby withholding the incidental benefit that would otherwise have been derived by downstream proprietors.

Coulson v. Aberdeen-Springfield Canal Co., 39 Ida. 320; 227 Pac. 29.

Class B. Cases in which the use served by the artificial condition had been totally *abandoned*.[3]

Drainage District No. 2 v. Everett, 171 Wash. 471, 18 Pac. (2d) 53;

Lake Drummond Canal and Water Co. v. Burnham, 147 N. C. 41; 60 S. E. 650; 17 L. R. A. (N. S.) 945.

Class C. Cases in which the artificial change made in the stream was of such a *limited, special* or *temporary* character as to alter or create *only correspondingly* rights in respect of the original channel and/or of the artificial one.

Arkwright v. Gell, 5 Mees. & W. 203;

Burrows v. Lang [1901], 2 Ch. Div. 508;

McEvoy v. Great Northern Ry. Co. [1900], 2 Ir. Rep. 325;

Mason v. Shrewsbury Ry. Co., L. R. 6 Q. B. 578;

Baily v. Clark, Son & Morcland [1902], 1 Ch. Div. 649;

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[3]There is, of course, no comparable abandonment in the causes at bar; but cases of abandonment are illustrative of the principle that such rights as may be acquired by downstream proprietors on the original channel, by reason of an artificial change serving a *limited, special or temporary purpose*, not only are subject to conditions and limitations in *correspondence* with the limited and special use while the same persists, but are also subject to defeasance by restoration of the natural condition when the use served by the artificial change is wholly abandoned. (See *Goodrich v. McMillan*, 217 Mich. 630; 187 N. W. 368.) The observations in this note do not, of course, apply to any case in which there has been an unlimited *dedication* of a new channel as a *substitute*, in whole or in part, for the natural channel, and in those cases, the natural condition, once the dedication is complete, cannot be restored to the injury of proprietors on either the original or the substituted channel.

Rameshur Pershad Narain Singh v. Koonj Behari Pattuk, L. R. 4 App. Cas. 121;

Wood v. Waud, 3 Ex. 748; 154 Eng. Rep. Reprint 1047;

Greatrex v. Hayward, 8 Ex. 291; 155 Eng. Rep. Reprint 1357;

Oliver v. Lockie, 26 Ont. Rep. 28;

Peter v. Caswell, 38 Oh. St. 518 (a flood gate or weir discharging into the old channel);

DeWitt v. Bissell, 77 Conn. 531 (a mill pond, use of which necessarily entailed a lowering of the water level during dry seasons);

Mitchell Drainage District v. Farmers Irrigation Dist., 127 Neb. 484; 256 N. W. 15 (a spillway and needle gate discharging into the old channel);

Whitcher v. State, 87 N. H. 405; 181 Atl. 549 (a gate in a dam discharging into the old channel).

Of the cases in Class A, *supra*, the ruling is:

"The right to the *beneficial use* [of water] is all that can be acquired. * * * It follows, therefore, that *no legal duty* devolves upon any water user to divert any more of the water to which he is entitled, than he can put to a beneficial use [and hence] in permitting the water not needed by him to *remain* in the [stream, he] cannot be held to have contributed to the injury" caused thereby. [227 Pac. 30.]

Of the cases in Class B, *supra*, the ruling is:

"Where the proprietor of an upper tenement constructs and maintains on his *own* premises, and for his *own* convenience and advantage, an artificial

waterway, or any artificial structure, affecting the flow of water, and such structure invades no right of the lower proprietor, and gives indication that it is for a temporary purpose or a *specific purpose* which may at any time be abandoned, the upper proprietor comes under *no obligation* to maintain the structure and the conditions produced by it from lapse of time, though the *incidental* effect has been to confer a benefit on a lower tenant. Nor in such case does the lower proprietor acquire any right which only rests on *prescription.* An easement arising in that way can only be established by reason of adverse possession or continuous invasion of another's right." [18 Pac. (2d) 50.]

Of the cases in Class C, *supra,* the rulings are sufficiently summarized in Gould on Waters, where, after recognizing in Sec. 225 the rule that an artificial watercourse under certain circumstances may acquire the status of a natural channel, the author, in Sec. 340, says:

"An active enjoyment for more than the statutory period is *not* an enjoyment as of *right,* if during the period it was known that it is only permitted so long as some *particular purpose* is served."

The case of *Arkwright v. Gell, supra,* is typical. It was there held that the right to maintain an artificial watercouse (a drain from a mine), over the land of another, gave *no* rise to rights by prescription in the latter to the enjoyment of the flow of the water through such drain because, as said in 3 Farnham on Waters and Water Rights, Sec. 827 (d),

"the right to the flow being based on the presumption of a grant, there is nothing to support the pre-

> sumption in such a case, because the mine owner will *not* be presumed to have intended to grant a right which will *interfere* with *his use* of the mining property, . . . And the court, in *Burrows v. Lang*, [*supra*], said that the meaning of a 'temporary purpose' is not confined to a purpose that happens to last in fact for a few years only, but includes a purpose which is temporary in the sense that it may, within the reasonable contemplation of the parties, come to an end. If a man makes a watercourse leading water to a mill pond for the use of his *own* mill on his *own* land, that is a temporary purpose, as it is limited to the period for which he uses the mill. It is *not* meant to be a permanent alteration of the *face of nature*, but a temporary alteration for the *purpose of*, and *co-extensive* with, the carrying on of a *particular business*. * * *."

A comparison of the classification of petitioners' cases above made with the classification, *infra*, of the cases cited by the State Court, will afford a ready means of apprehending the wholly distinct character of the two lines of authority (other than the cases included, respectively, in "Class 3" of those cited by the State Court and in "Class C" of petitioners' case), and will likewise serve to demonstrate the identity in principle of the causes at bar with petitioners' authorities as well as with those of said "Class 3," and the inapplicability herein of the rule on which respondent relies.

Abstract of Certain of the Cases in the Several Classes of Those Relied Upon by Petitioners.

(a) Case in Which a Person Entitled to Water Had Failed to Divert the Same.

The only case in which the ground of complaint was that a person entitled to water for beneficial use did *not* divert the same because of *no need* therefor is *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320; 227 Pac. 29, a case fully sustaining petitioners. There the owner of land in an irrigation project sued the canal company for the loss of a bull killed by falling into a gulch washed out by the discharge, through defendant's waste ditch on plaintiff's land, of *unused* water from defendant's canal. Defendant pleaded, as contributory negligence, that plaintiff had failed to *avail* himself of the *full quantity* of water to which he was entitled for irrigating his land, with the result that the water not taken by him flowed through the waste ditch and washed out said gulch. In disallowing such plea of contributory negligence, the court said:

> "It is against the *public policy* of the state, as well as against express enactments, for a water user to take from an irrigation canal *more* water, of that to which he is entitled, than is *necessary* for the irrigation of his land and for domestic purposes. The waters of this state belong to the state, and the right to the *beneficial use* thereof is all that can be acquired. * * * It follows, therefore, that *no legal duty* devolves upon any water user to divert any *more* of the water, to which he is entitled, than he can put to a *beneficial use*. * * * In permitting the water not needed by him to *remain* in the

> canal and pass into the waste ditch, appellant [plaintiff] cannot be held to have contributed to the injury." [227 Pac. 30.]

The public policy of Idaho as declared in the *Coulson Case, supra*, is likewise that of California. In *California Pastoral, etc., Co. v. Madera C. & I. Co.*, 167 Cal. 78, this policy is held "to require the highest and greatest possible *duty* from the waters of the State [for] beneficial purposes," the court emphasizing that "any actual use in *excess* of reasonable requirement is *waste*." [167 Cal. 84.]

(b) Cases in Which the Use Served by an Artificial Alteration in Respect of a Stream Had Been Totally Abandoned.

The Supreme Court of California (adopting respondent's contention), holds, in effect, that the Los Angeles Aqueduct is a *permanent* waterway and that its use can neither be abandoned, nor *limited* to the diversion of any volume of the natural flow of Owens River *less* than its capacity. Such holding is directly contrary to the controlling principle of the doctrine of appropriation,—namely, that when the *use* ceases, the *right* ceases. [Cal. Civ. Code, Sec. 1411.] The right to divert under an appropriation is a *privilege* accorded by the State, and *not* an obligation. That privilege may be forfeited for nonuse—regardless of the intention of the appropriator. In view of these long recognized principles of appropriation, few cases have arisen where the appropriator's right to abandon his appropriation has been questioned, but in each such case, the right of the appropriator to cease his appropriation (diversion or storage) has been upheld.

In 27 R. C. L., p. 1205, Sec. 123, their holdings are thus summarized:

> "* * * riparian owners on a stream *cannot compel* one who has long diverted water therefrom for use in a canal to continue the diversion, although by reason thereof the natural channel has become too small to contain the full volume of the stream. * * *."

In *Drainage District No. 2 v. City of Everett*, 171 Wash. 471, 18 Pac. (2d) 53, a dam impounding the waters of a creek under a *perpetual* right to divert the same for the use of the city, was destroyed upon the abandonment of this source of the municipal supply, thereby restoring the flow of the creek to the old channel. Such water as had escaped over the dam's spillway had always followed the natural channel; but in a portion of a slough connected therewith, there ceased to be any water and, accordingly, the owners thereon filled it in and used it for agricultural purposes. This dry condition of the slough had continued for some twenty-six years. During the earlier portion of this period, the Drainage District installed a drainage system and, in so doing, deemed it unnecessary, by reason of the city's diversion from the creek, to take into consideration the former flow through the slough. Before destroying the dam, the city let the impounded water escape gradually and flow down the natural channel of the creek and thence into the drainage ditches of the District, wherein it deposited silt. The District recovered damages from the city but was denied an injunction, whereupon both parties appealed. The District contended that the *artificial* condition (the diversion and impounding), which had existed for thirty years, constituted a *permanent* change upon the continuance of

which the District had relied in improving its property, and, accordingly, that it was entitled to have such condition maintained. In reversing the judgment for damages and affirming the denial of the injunction, the court said:

> "So long as appellant [defendant City] maintained the dam in such a manner as not to injuriously interfere with the legal rights of others below and above the reservoir, no right of action could be maintained against the appellant. Does it not follow that the appellant could at any time legally abandon that dam and permit the waters, which otherwise would be impounded, to flow as those waters were wont to flow in the *natural* channel on the property of the respondent [plaintiff District], which property was the servient estate? * * *
>
> "The acquisition of the right to divert the waters and to maintain a reservoir for impounding those waters, though that artificial condition was maintained by appellant [defendant] for the prescriptive period, carried with it *no reciprocal right* to have its maintenance continued for the benefit of the servient estate [plaintiff's property]." [18 Pac. (2d) 55.]

See also *Lake Drummond Canal & Water Co. v. Burnham*, 147 N. C. 41; 60 S. E. 650; 17 L. R. A. (N. S.) 945 (1908), holding that the operator of a canal for public travel could *not* be compelled by defendants to maintain a cross canal serving as a feeder of water into the main canal by reason of "an *incidental benefit* through drainage by the cross canal" of defendants' lands. [*Mitchell Drainage District v. Farmers Irrigation District, supra*, citing the *Lake Drummond Case* at 256 N. W. 20.]

(c) Cases in Which the Artificial Alteration in Respect of a Stream Was Made for a Special and Limited Purpose.

Any change in respect of the flow of a stream made to serve a *special* and *limited* purpose is only a change *pro tanto* in correspondence with the *fulfillment* of that purpose. A structure such as the Los Angeles Aqueduct constitutes a striking instance in which its limited and special character is *advertised*, for all who run to read, by the purpose it is designed to serve and its use,—to say nothing of its appurtenances (particularly the gates at Intake for excluding therefrom, or admitting thereinto, the water of Owens River at will).

The causes at bar present a situation,—*not* of restoration of a natural condition by abandonment or modification of the purpose served by the artificial condition,—but one in which the artificial change is, has been, and will continue to be, of *limited* scope and *measured* by the *beneficial uses* petitioners have undertaken to serve; while respondent's grievance is that the artificial change has not been *greater*, to wit, one measured by the total continuous *capacity* of the Aqueduct (necessary outages excepted), irrespective of the uses served by petitioners.

In *McEvoy v. Great Northern Ry Co., supra*, "Palles, Ch. B., says it is settled law that the rights to the water flowing in an artificial watercourse constructed by a particular person upon his own land and for his own benefit are not regulated by the law applicable to natural watercourses; but are to be ascertained by a view of the *purposes* for which the original structure was built." [3 Farnham on Waters and Water Rights, sec. 827d, p. 2437, note 15.]

In 1 Wiel on Water Rights (3rd ed.), it is said:

> "Sec. 60: * * * Where the owner of the land has artificially changed the course of the stream so as to affect other riparian proprietors favorably, and acquiesced therein for a sufficient length of time, he cannot claim the right to change the flow of the water to the detriment of such other riparian owners; for such acquiescence on his part is binding like a public dedication. * * *
>
> "This rule rests upon a *quasi dedication* of the artificial condition to the *public*, and the essence of it is the growth of a *community* dependent upon the artificial condition. Where *no* such community-interest has been created, and the question is solely between a single individual and the original creator of the artificial watercourse or condition, the rules purely of *prescription*, * * * apply. The rule of dedication to the public just set forth is *in*applicable."

One of the most recent and, because of its review of the authorities, one of the most valuable of the cases upon the point here in issue is *Mitchell Drainage District v. Farmers' Irrigation District, supra.* Plaintiff drainage district there sought an injunction to prevent defendant irrigation district from permitting waters from a certain draw to pass through the latter's irrigation canal and thence into the drainage district. For many years, defendant had intercepted these waters for use for irrigation. The draw had formerly been a dry slough for most of each year, but after the irrigation ditch was constructed water therefrom gathered in the draw. Defendant's diversion of the waters of the draw did not prevent seepage water from coming down into Mitchell and therefore plaintiff constructed its drainage ditch, but without taking into

account the waters in the draw through its reliance upon defendant's continuing to intercept them. A spillway was put in the irrigation canal when it was built, directly opposite the draw; and after the completion of the drainage ditch a *needle gate* also was put in the irrigation canal opposite the point where the draw came into the same. Thereby the waters in the canal could be let through into the drainage district. The needle gate was *used* but a few times after its installation in 1914, and again some twelve years later, after which, due to plaintiff's protests, it was closed.

In the suit, commenced because of the opening of the needle gate in 1932, plaintiff based its claim to injunctive relief on the grounds, (1) that defendant is estopped to discharge the water, so long intercepted, into the drainage district; (2) that defendant had obtained a prescriptive right to the water and plaintiff had obtained a reciprocal right to have its flow continued as it had been during the prescriptive period; and (3) that the new watercourse had become the *natural* course of the stream and the right to its continuance had become absolute. In denying the injunction, the court, after reviewing the authorities, says:

> "There is, it must be conceded, a clearly distinguishable difference between the prescriptive right obtained for a *temporary* or *specific* purpose and one that from the beginning was, or later became, of a permanent character. Dams for mills illustrate the first. A diversion of water out of the old bed of a stream in order to make it more fit for agriculture illustrates the second. The effect may be the same in both, but the *purpose* is different. The first is for the benefit of the builder of the dam. Advantages accruing to upper or lower owners are *incidental only.*

The second may be for the very purpose of *benefiting* the owners of the land and they begin at once to make their improvements in reliance on the change thus made being permanent.

"A dam is generally held to be a structure for a specific and temporary purpose, although of course it may continue for many years. The placing of the *needlegate* in the south bank of defendant's irrigation district was a continuous *notice and threat* to the plaintiff that the waters from Wet Spottedtail Draw might be let through. * * *

"Unquestionably the owner of a dominant estate does *not* generally owe the servient estate any duty except not to injure him by irrational conduct or wantonly or capriciously. *Taft v. Bridgeton Worsted Co.*, 237 Mass. 385, 130 N. E. 48, 13 A. L. R. 928. * * * The estate is for the benefit of the one that is dominant, and the servient estate remains servient. While there are many cases where rights accrue to the servient estate on account of acquiescence or estoppel, the mere *intercepting* of the waters by defendant irrigation district would *not* and could *not* give the plaintiff drainage district *any rights*. The use of it was for the benefit of *defendant* irrigation company. Through use of such waters for ten years or more the irrigation company might obtain the right to continue to use them. This would give *no* corresponding or *reciprocal* rights to the drainage district to require the irrigation district to continue to use or care for the waters unless the defendant became estopped, and the only estoppel suggested in this case is the alleged fact that the drainage district was established and its money expended to defendant's knowledge under the belief induced by defendant that the drainage district would never be asked

or required to take care of these waters. Plaintiff to acquire any rights would have to show that it improved its property with reference to the diversion and in *reliance* on a continuance thereof, which it had *no right to do* in view of the *needle-dam* and spillway. * * * Our conclusion is that the weight of recent authority supports the proposition that *no* reciprocal right accrued to plaintiff because defendant intercepted and used these Wet Spottedtail waters; that even if such right exists plaintiff has not fully brought itself within the principle of the authorities it relies on, since *all idea of permanency is destroyed by the spillway* which was put in when the dam was constructed *and by the needle-gate* which was put in in the fall or early winter after the completion of plaintiff's original drainage ditch; that if plaintiff could acquire any rights to demand of defendant that it continue to intercept and use those waters, such right would have to be based on principles of acquiescence, dedication or estoppel, and that the facts here do not justify a finding in plaintiff's favor on such grounds. * * *." [256 N. W. 21-22.]

In *Felton v. Simpson,* 11 Ired. 84 (to quote Gould on Waters, sec. 340),

"* * * the Supreme Court of North Carolina held that the owner of land protected by a dam which ponded the water in heavy falls of rain until it was drained off by ditches leading from the pond through the plaintiff's land, could *not* gain a *prescriptive* right to the benefit of this protection, inasmuch as there was nothing which could be granted, and *no adverse possession* of anything which, without a grant, would expose the party to an action. The submission to the exercise of an easement by the

owner of the dominant estate, for *his own* purposes and in *his own* way, does *not* necessarily give the servient owner a right to the continuance of the easement imposed, because it is attended with incidental advantages to the latter; but the former may, if he chooses, cease to exercise it entirely. An active enjoyment for more than the statutory period is *not* an enjoyment as of *right*, if during the period it was known that it is only permitted so long as some *particular purpose* is served."

In the cases at bar, petitioners have altered the natural water level of Owens Lake precisely to the extent that their draught upon Owens River for supplying The City of Los Angeles has affected such level, and no more or otherwise,—a circumstance rendering particularly pertinent the cases of Class C, *supra.*

The Distinction Between a Conduit Serving a Specific and Limited Purpose and an Artificial Channel Serving All of the Purposes of a Natural Channel in Substitution Therefor.

In *Chowchilla Farms, Inc. v. Martin,* 219 Cal. 1, the reason for the court's conclusion that the (originally) artificial channel there under consideration had become the naturel channel is stated to be "the permanent nature of the new channel, the long uninterrupted *use* thereof as a *natural* channel and the complete and consistent acquiescence in such use by *all* those through whose *lands* said channel *runs* or who were *instrumental* in its *construction.*" [219 Cal. 25.] In that case, an artificial channel through a swamp, by means of which water from King's River flowed into San Joaquin River, had existed and

been used uninterruptedly for a long time "as the *natural* [drainage] channel." The controversy was between two claimants to the water and the uses that had been made of the *artificial* channel in all respects *conformed* to the uses that a *natural* stream channel regularly serves. In other words (to adopt the language by the court quoted from *Falcon v. Boyer*, 157 Iowa, 745; 142 N. W. 427, at 429, "it had become a *living*, flowing *stream* of water, with all the essential *elements* of a watercourse." [219 Cal. 16.]

The Los Angeles Aqueduct, however, entirely lacks these elements. While it is of a "permanent nature" in one sense of the term,—*i. e.*, that of structural permanency,—such structure has not, nor has the flow of water in it, that quality of permanency attaching to a *natural channel* or to a *natural flow* of water. Both the Aqueduct and the flow of water therein are dependent for their continuance and regulation upon *human will and activity*, while both a natural channel and the natural flow of its stream are dependent in respect of both continuity and regulation solely upon the *forces of nature* operating uninterruptedly. The use of the Aqueduct on the other hand and the flow of water therethrough is regulated and/or discontinued at the will of petitioners as actuated by the exigencies of the *river flow*, the *demands* served, necessary *maintenance, etc.*

Again, the Aqueduct has never been *used* "as a natural channel," but as a mere *transportation device* for conveying water from the watershed of its origin to its place of use in a distant one. If it were used as a natural channel, the water therein would partake of the nature of the *realty*. Obviously, from the moment the water enters the Aqueduct and is thereby severed from the River (so to

speak), it becomes *personal* property, to which neither riparian nor appropriative rights can attach, and anyone abstracting it therefrom would be guilty of a larceny irrespective of his ownership of land bordering on the Aqueduct. Furthermore, if the Aqueduct were *used* as a natural channel, the *public* would have access thereto for fishing, boating and bathing. *No* such public right can possibly attach to the Aqueduct itself or to the water therein, and an entry thereon otherwise than by permission of the owner would be a trespass.

Finally, the acquiescence in the use of an artificial channel that may give it the *status* of a natural channel, must be "by all those (a) through whose lands said channel runs", or (b) "who were *instrumental* in its *construction.*" [*Chowchilla Case, supra.*] Respondent, in the causes at bar, holds no land through which the Aqueduct runs, and the only entities instrumental in its construction were the City and its subordinate agencies, the predecessors of the present Department of Water and Power. Apart from this, however, there being *no use* of such an aqueduct as a natural channel, such acquiescence is an *impossibility.*

Although presently disregarded by the State court, its own comprehensive treatment of this subject in the *Chowchilla Case, supra,* renders unnecessary further reference to the authorities demonstrating the erroneous character of the judgment whereof review is sought. However, we notice briefly the cases presently cited by that court [143 Pac. (2d) 15-16], in order to demonstrate that *not* a single *one* of them is in point or supports the State Court's view, and that one of them (*Kray v. Muggli, infra*) has met with practically universal condemnation by jurists and text writers. There is only one case in the books

(*Coulson v. Aberdeen-Springfield Canal Co., supra*), wherein the ground of complaint was that a person entitled to water for a given beneficial use did not *divert* water for which he had *no use*,—a case directly and unequivocally *contra*.

Classification of Cases Cited in the Opinion of the State Court.

Certain of the cases now to be classified have features permitting of their inclusion in more than one category, and this will be done with the addition in each instance of an appropriate cross reference.

Class 1. Cases in which the artificial condition of the stream had been created at a time when the land affected thereby and involved in the controversy was in a *common ownership* which was thereafter *severed* by conveyance made while such artificial condition persisted.

Pere Marquette Ry. Co. v. Siegle, 260 Mich. 89; 244 N. W. 239 [see also under Class 6, *infra*];

Shepardson v. Perkins, 58 N. H. 354 [see also under Class 4, *infra*];

Marshall Ice Co. v. La Plant, 136 Ia. 621; 111 N. W. 1016 [see also under Class 6, *infra*];

Greisinger v. Klinhardt, 321 Mo. 186; 9 S. W. (2d) 978.

None of these cases of Class 1 is at all in point, the causes at bar *not* presenting the controlling circumstance of a common ownership subsequently severed during the existence of the artificial condition produced by petitioners' diversions from Owens River.

Class 2. Cases in which a previously existing condition of the stream, whether natural or artificial, had been altered by *joint or reciprocal action* of riparian proprietors, including the respective parties to the litigation and/or their predecessors.

Matthewson v. Hoffman, 77 Mich. 420; 43 N. W. 879 [see also under Class 5, *infra*].

Obviously, in the causes at bar there was *no* such joint or reciprocal action as that which was determinative in the case cited last above in Class 2.

Class 3. Cases in which the artificial change made in the stream was of such a *limited, special,* or *temporary* character as to alter only *correspondingly* rights in respect of the original channel and/or of the artificial one.

Hammond v. Antwerp Light & Power Co., 230 N. Y. Supp. 621;

Smith v. Youmans, 96 Wis. 103; 70 N. W. 1115;

Peter v. Caswell, 38 Ohio St. 518.

[N. B. This category is the same as Class C, *supra*, of the cases relied upon by petitioners, and is inclusive of those, wherein the limited, special, or temporary character of the artificial change had been specially *advertised* by the nature of the artificial structure or its appurtenances.]

These cases of Class 3, so far as in point, support petitioners' contention that, as the artificial condition produced by them was merely the *abstraction* from Owens River of certain *absolute* volumes of water, and as they were *greater* in 1937 than ever theretofore, no duty could

on any theory devolve on petitioners to make *still larger* diversions.

Class 4. Cases in which landowners on the new channel, or on any stream or lake into which it discharged, had *acquired* by use or sufferance the right to *avail* of the water flowing in, or discharging from, such new channel.

Chowchilla Farms, Inv. v. Martin, 219 Cal. 1;

Shepardson v. Perkins, 58 N. H. 354 [see also under Class 1, *supra*].

These cases of Class 4 are in nowise analogous to the causes at bar. The artificial channels there in question were designed to perform *all* of the functions of natural channels, and the land owners thereon had acquired *rights,* by use or sufferance, in so much of the water as flowed therein; but where the same was only a *part* of the flow of the stream, the rights so acquired did *not* affect the status of the natural channel, as such, in respect of the water that *continued* to flow in it. On the other hand, the Los Angeles Aqueduct serves only the *single* purpose of transporting water in volumes determined by the current *demands* therefor in The City of Los Angeles, and no rights have attached thereto in favor of any land owner as such.

Class 5. Cases in which the owners of land on the wholly or partially *abandoned* natural channel had acquired an easement in the *artificial* channel for the dis-

charge or drainage of water which had originally flowed over or through their land.

Mathewson v. Hoffman, 77 Mich. 420; 43 N. W. 879 [see also under Class 2, *supra*];
Matheson v. Ward, 24 Wash. 407;
Delaney v. Boston, 2 Harr. (Del.) 489;
Ford v. Whitlock, 27 Vt. 265.

The causes at bar present no feature in common with these cases of Class 5, the natural channel of Owens River below Intake *not* having been abandoned, in whole or in part, but having always existed as such and having, throughout the Aqueduct's history, served to convey the river flow *in excess* of petitioners' diversions, as well as the *make* of the stream below Intake, to the river's natural point of discharge into Owens Lake.

Class 6. Cases in which the respective parties have *by contract* agreed to maintain an artificial condition in respect of a stream or body of water.

Pere Marquette Ry. Co. v. Siegle, 260 Mich. 89; 244 N. W. 239 [see also under Class 1, *supra*];
Marshall Ice Co. v. La Plant, 136 Ia. 621; 111 N. W. 1016 [see also under Class 1, *supra*].

These cases of Class 6 have nothing in common with the causes at bar, there being here no contractual relationship between the parties.

Class 7. Case in which the party creating the artificial condition in respect of the stream had thereby *adversely* invaded the land of another and, by *adversely* maintaining such condition for the *prescriptive* period, had acquired a permanent easement so to do.

Kray v. Muggli, 84 Minn. 90; 86 N. W. 882.

This case of Class 7 is not at all in point. In the causes at bar, petitioners by their diversions did *not* invade the properties of respondent at all, nor divert water *adversely* to respondent. As they acquired *no* right from respondent by prescription, there is lacking any possibility of a *reciprocal* right arising in respondent. (That this distinguishment of the *Kray Case* is sound, see *Schulenberg v. Zimmerman*, 86 Minn. 70, 90 N. W. 156, at 157, decided by the same court.)

Moreover, *Kray v. Muggli, supra*, is opposed to the weight of authority in treating as permanent a mill-dam,—*i. e.*, a structure otherwise universally regarded as *temporary* in the sense that its maintenance is contemplated only so long as it serves the specific and limited purpose for which it was erected.[4]

There has been no case cited (and we have been able to find none), wherein a conduit constructed and operated to effect and avail of a statutory *appropriation* of water has been held to be a *natural watercourse*. We have developed, *supra*, the point that an appropriator of water is a mere *licensee* of the State. The amount of water which he may divert is *not* fixed by any obligation to, or under-

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[4]In disapproval of this case, note the following comments:

"There seems to be no principle upon which *Kray v. Muggli* can be supported. [3 Farnham on Waters and Water Rights, p. 2406.]

"The doctrine [of reciprocal rights] must depend for its existence upon [*Kray v. Muggli* and *Middleton v. Gregorie*, 2 Rich. (31 S.C.L.) 631]; and since the doctrine as applied in them is that the acquisition of a prescriptive easement imposes an equal burden to maintain the easement, without any claim of adverse right on the part of the owner of the servient estate, which has *no* place in law of *prescriptive* titles, the broad doctrine of *reciprocal* rights * * * must be held to have *no existence*." [*Id.*, pp. 2438-2439.]

standing with, a lower riparian, but is definitely *limited* to such volume thereof as has been applied to beneficial use. The appropriator may not only abandon his right of diversion at any time, but he will be held to have forfeited his right (in whole or in part) if he fails for the statutory period to apply the water to a beneficial use. Of course, the appropriator may,—nay, indeed, *must*,—abandon (in the sense of allowing to *remain* in the stream) that portion of the flow thereof for which he has *no* beneficial use.

The State court attempts to distinguish *Drainage District No. 2 v. City of Everett*, 171 Wash. 471; 18 Pac. (2d) 53; 88 A. L. R. 123, by declaring that, in refusing to persons who have made costly adjustments in reliance upon an artificial change in respect of a stream being permanent "as much protection as if the condition were natural," the Washington court so decided "apparently because it would be an excessive burden for one to maintain a dam that is of *no further use* to him." There is *no* such intimation in that opinion.[5] The case explicitly holds that "an artificial waterway, or any artificial structure, affecting the flow of water [that] invades *no* right of the lower proprietor and gives indication that it is for a *temporary purpose* or a *specific purpose*, [gives rise to] *no obligation to maintain* the structure and *conditions* produced by it, from lapse of time, though the *incidental* effect has been to confer a *benefit* on the lower

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[5]This supposed ground of decision, if adopted in the case of *Kray v. Muggli*, *supra*, would have produced a result directly contrary to the actual decision therein.

tenant, [because] there is *no foundation* for a doctrine of *reciprocal* easements founded upon the *prescriptive right* of *only one* of the parties in interest." [18 Pac. (2d) 56-57.]

The State court is even more unhappy in its references to the cases of *San Gabriel Valley Country Club v. Los Angeles*, 182 Cal. 392; 188 Pac. 554, and *Mitchell Drainage District v. Farmers' Irrigation District*, 127 Neb. 484; 256 N. W. 15. The *San Gabriel Case* is cited to the proposition that "the rights of those who improve land previously submerged would be infringed if the land were *submerged again.*" [143 Pac. (2d) 16.] There is no such ruling or dictum therein, the case having involved erosion of land,—*not* submersion at any time,—caused by the increased velocity of the flow in a stream due to artificial improvement of its natural channel. Moreover, such erosion was held *not* to constitute an actionable injury

The *Mitchell Drainage District Case* is cited to the proposition that "when the owner maintains [a] dam but alters the flow to increase his profit at the expense of those below him, or merely to be *arbitrary*, it is reasonable to require that the alteration shall not injure those who have relied on the customary operation of the dam in the past." [143 Pac. (2d) 16.] This case (see *supra*), fully sustains petitioners. The discharge of water there in question was neither for the purpose of "increasing defendant's profit" nor was it "arbitrary", but merely to return to the stream of its origin water which defendant did not desire to retain in its irrigation canal. In a sense, such discharge was not even "customary," for the needle

gate through which it was effected had been operated only a few times shortly after its installation in 1914, again some 12 years later (1926), and then again in 1932 after an interval of 5 additional years. Thus, in the 17 years next preceding the action, it had been operated but once before the occasion resulting in suit. The court, however, held that it was the mere *potentiality* of the use of the needle gate to perform the function it was designed to serve,—and *not* its *actual use*,—that "destroyed all idea of *permanency*" of the canal's interception of the waters previously taken into and retained in the canal, such waters being those of a draw crossed by the canal and the needle gate, when opened, discharging such waters into the same draw below the canal.

The Los Angeles Aqueduct of itself *gave notice* that its specific purpose was to serve the demands for water in The City of Los Angeles, and, accordingly, that its use would be to only such extent of its capacity as should be necessary so to do,—a notice rendered all the more definite and forceful by the constitutional limitation of the appropriative right to beneficial use, and by the unvexed current of prior judicial authority in California declaring "*beneficial use* [to be] the measure of the appropriate right." To this standing notice was added that imported by the gates at Intake for regulating the admission of water into the Aqueduct, and for excluding therefrom any of the river flow in excess of petitioners' needs and thus permitting it to pursue its natural course down the channel of Owens River into Owens Lake.

As Petitioners Owed No Duty to Respondent to Divert Water to the Capacity of Their Facilities, Their Failure So to Do Was Not Negligent; and There Is No Slightest Hint of Wanton or Malicious Conduct by Petitioners.

Any duty of petitioners to divert and store water is one arising out of its obligation to serve its consumers and is, therefore, owing to them alone,—and *not* to a downstream proprietor not of that class, such as respondent. The spreading of water is one mode of effecting storage of a limited portion thereof in aid of petitioners' discharge of their obligation to provide a municipal water service. Petitioners have *no lawful authority* to engage in irrigation for *agricultural purposes*, or, *per se*, in either *conservation* of water or *flood control*. In fact, it is difficult to conceive of any municipality being granted power to perform such functions except as an incident to the rendition of municipal water and/or hydroelectric services, or for flood protection within its own territory.

Even if there had been a *shortage of water* in The City of Los Angeles (which, emphatically, there never has been), and if such hypothetical shortage had been due to some default on the part of petitioners, this circumstance could *not* operate to vest respondent with any such cause of action as is herein asserted; for it is elementary that A's breach of a duty owing to B cannot become the basis of an action in favor of C to whom no such duty is owing.

Stowers v. Dwight Mfg. Co., 202 Ala. 252, at 254; 80 So. 90, at 92;

Bogdon v. Los Angeles, etc. Ry. Co., 59 Utah 505; 205 Pac. 571;

Garland v. Boston etc. Ry. Co., 76 N. H. 556; 86 Atl. 141; 46 L. R. A. (N. S.) 338; Ann. Cas. 1913 E, 924;

62 *Cor. Jur.* 1096;

45 *Cor. Jur.* 639 and 647.

The Notice Imported by the Existence and Purpose of the Los Angeles Aqueduct.

As testified by Mr. Pedder, its then secretary-treasurer and later its president, respondent, *before* acquiring its properties on Owens Lake, *knew* of the *existence* and *purpose* of the Los Angeles Aqueduct. No one can be blind to the fact that an aqueduct constructed to provide a *municipal supply* of water is of necessity *operated in step* with the *demands* for such water, or unmindful of the seasonal, annual and cyclic *variations* in stream *flow* dependent, as such flow is, upon the wide contemporaneous variations in *precipitation* notice of which it is impossible to esape. Moreover (as we conceive), the practice of constructing, for municipal supply, aqueducts having capacity *in excess* of that currently needed in order to meet future *growth* in demands and equipped with control gates for the purposes of *regulating* the water *admitted* into the same, is so universal as to require the Court to take judicial notice thereof. It follows that, by its complaints alone [Clk. Tr. pp. 20-21, 210-212], respondent is shown to have had *notice*, when it acquired its properties, of the limited extent of *diversions* into the Los Angeles Aqueduct to be anticipated. Accordingly, it suffered no wrong by action on petitioners' part conforming strictly to such notice. All thought of the possibility of *continuous* diversion from Owens River into the Aqueduct to its full *capacity*

or of operation of petitioners' reservoirs to like *capacity* whenever water in that amount should be available, or of petitioners' *controlling* the flow of the river in *excess* of their needs,—the basic idea upon which respondent proceeds,—is destroyed by the nature and the past use of the Aqueduct of which respondent had actual or imputed notice, and by which *alone* was its *future* use to be gauged.

The Crucial Findings of Fact Do Not Support the Judgment.

(a) There Is Neither Finding nor Evidence That Petitioners Ever Operated the Los Angeles Aqueduct to Continuous Full Capacity.

The crucial findings of fact are those respecting petitioners' *representations by conduct,* there being no other type of representation whatsoever. On this head the lower court found that "for many years prior to both 1932 and 1937, petitioners took *all* or *substantially* all of the water from Owens River into their Aqueduct system", and "during the years immediately preceding *took all of the surface water* therefrom" [Finding 6, par. 1; Clk. Tr. p. 525]; that "during certain of said years there were virtually *no diversions* of water from said Aqueduct system and during the remainder thereof * * * such diversions [had] *no material effect* upon * * * the *dryness* * * * of Owens Lake and the *alkalinity* of its subsurface brines" [Finding 7, par. 1; Clk. Tr. pp. 529-530]; that thereby petitioners "*represented* * * * that they would take, and led all interested persons to reasonably *believe* that they would take and continue to take [into said Aqueduct system], *all* of the flow of Owens River * * * up to the reasonable *capacity* of said

Aqueduct system * * * reasonably constructed and reasonably operated." [Finding 7, par. 2; Clk. Tr. pp. 530-531.]

The judgment herein, adopting respondent's theory of these causes, is in effect predicated upon a supposed *duty* in petitioners to operate the Los Angeles Aqueduct to *capacity*, notwithstanding the *demands* for water supplied by them did *not* in 1937, or at any time hitherto, require such operation. If this were a tenable view, it would necessarily be based upon operation of the Aqueduct to capacity prior to 1937. Accordingly, the total omission of any finding that the Aqueduct was *ever* operated to full *capacity* leaves the judgment without support.

(b) The Finding That Petitioners Diverted All of the Flow of Owens River During the Drought (When Such Flow Was Far Less Than the Aqueduct's Capacity), Constitutes No Basis for the Further Finding That Respondent Relied Upon the Diversions of All the River Flow Within the Aqueduct Capacity on the Recurrence of High Stages of the River.

Similarly, the omission of any finding *correlating* petitioners' taking of "all or substantially all" of the river flow with the volume of contemporaneous river *flow* likewise leaves the judgment without support, for as petitioners diverted all, or virtually all, of the river flow during the drought and (as is the fact) did *not* then operate the Aqueduct to capacity, such total diversion during that dearth of water could not *possibly* constitute any representation of future operation thereof to any greater capacity than theretofore. And as the diversions in 1937 and in the months thereof here in question were in *greater* volume than in any corresponding prior period, they could

have disappointed no legitimate expectation even though they still did not employ the full capacity of the Aqueduct.

The omission from the findings last referred to renders them inconsistent and contradictory, for as petitioners' diversions during the drought of practically all of the river's flow did *not* require the *full capacity* of the Aqueduct, they could constitute no representation by conduct leading respondent (as found by the trial court) "to reasonably believe that [petitioners] would take and continue to take [into the Aqueduct] *all* of the [river] flow * * * up to the [Aqueduct's] capacity."

The trial court further found that after respondent acquired its properties in 1932, petitioners "continued to operate their Aqueduct system as * * * theretofore * * * and * * * Owens Lake continued to be a 'dry lake'; [that] *in reliance thereon,*" respondent improved its properties, *etc.,* and operated the same until stopped by the flow of water into the Lake in 1937 [Findings 8 and 9; Clk. Tr. pp. 531 and 533-534]; and that in all these activities respondent "relied upon [such] continuance * * * and upon the *permanency* of the *construction* of petitioners' said Aqueduct system and of [their] taking of Owens River water therein and upon [their] operation [thereof] as it had been operated * * * prior to both 1932 and 1937" [Findings 10; Clk. Tr. pp. 533-537], "*so that* the bed of Owens Lake was *dry* and exposed." [Conclusion 1; Clk. Tr. pp. 561-562.]

It thus appears that respondent's reliance was *not* upon petitioners' diversions into the Aqueduct to its *capacity,* but upon the *dry* condition of Owens Lake,—the *resultant* of the low stage of the river during the drought and of petitioners' then diversions which, however, reduced the

contemporaneous lake discharge *less* than they did *in 1937*. Again, the finding, not being one of reliance on previous diversions by petitioners to the *capacity of* the Aqueduct, but upon the *dry* condition of the Lake ensuing upon *lower* diversions than in 1937, does not support the judgment.

(c) The Finding Respecting Petitioners' Supposed Departure in 1937 From Its Prior Mode of Operating the Aqueduct Is No More Than a Finding That They Did Not Divert All of the Then River Flow,—Diversion of All Such Flow Being the Sole Standard of Conduct Found to Have Been Established by Their Prior Diversions.

The findings respecting petitioners' conduct make their diversion of practically the whole of the river flow during the drought, the standard of conduct with which is contrasted their mode of operation in 1937. The lower court found that on February 6, 1937, petitioners departed from that standard by "suddenly start[ing] to divert water *out of* their Aqueduct system" and continuing so to do "intermittently * * * until the end of June, 1937" [Finding 11; Clk. Tr. pp. 538-539], *contrary* to their *manner of operating* the Aqueduct *prior* to both 1932 and 1937 [Finding 14; Clk. Tr. p. 544]; that petitioners' operation of said Aqueduct in 1937 was "substantially *different* from their * * * operation [thereof] prior to both 1932 and 1937" in that they failed to operate the Aqueduct and their Owens Valley reservoirs to reasonable *capacity*, and to utilize their spreading facilities in Owens Valley to the extent of their use thereof in both prior and

subsequent years[6] [Finding 15; par. 2, and Finding 16; Clk. Tr. pp. 547-552]; and that petitioners, having theretofore diverted substantially *all* of the flow of Owens River "did in the spring and summer of 1937" depart from such *prior* mode of operating the Aqueduct and "diverted"[7] such flow *from* said Aqueduct upon Owens Lake and respondent's properties. [Conclusions 2, 3 and 10; Clk. Tr. pp. 562, 564, 567-568.]

There could be no such departure if, as we have demonstrated, the established standard of petitioners' conduct was merely the diversion of the *whole* stream flow during the *drought*, as distinguished from diversions to the Aqueduct's capacity. Hence, the omission of any finding that petitioners have ever operated the Aqueduct to *capacity* leaves without significance the finding of a supposed "departure" in this regard from prior conduct. The finding is one,—*not* of a departure from prior *capacity* operation,—but only of a failure to take *all* of the river flow in

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[6]The finding last above referred to contrasts the slight falling off in petitioners' use of its spreading facilities in 1937 with their prior use thereof,—a circumstance bringing into relief the failure of the findings to contrast petitioners' *use* of the Aqueduct's capacity in 1937 with such use in *prior* years.

[7]The complaints allege that petitioners in 1937 "suddenly *ceased*" to divert "the waters of Owens River into the Aqueduct and * * * commenced to divert said waters or a substantial *part* thereof into Owens Lake." [Par. VIII, Clk. Tr. pp. 164-165.] The departure in the findings from this allegation is explained by respondent's change of front during the trial by contending that petitioners, after 1929, diverted *all* of the flow of Owens River because the river channel passes through the Tinnemaha regulating reservoir. The Supreme Court of California, however, correctly treats the acts complained of as an "exclusion" of water from the Aqueduct,—and not as a "diversion" therefrom,—since it bases its decision on the rule that "one who makes substantial expenditures in reliance on long-continued *diversion* of water by another has a right to have the diversion *continued* if the investment would otherwise be destroyed." [143 Pac. (2d) 15.]

1937 after having diverted all thereof when such flow was far *less* than the Aqueduct's *capacity* and when the *proportion* of such capacity actually employed in such total diversion was far *less* than was in use either in 1937 or in the months thereof here in question.

(d) The Finding Respecting the Supposed Waste of Water Due to Its Exclusion by Petitioners From the Aqueduct Does Not Support the Judgment.

Finally, the trial court found that all water by petitioners "diverted",—*i. e., excluded,*—from the Aqueduct and, by reason of such exclusion, discharging into Owens Lake was and is "wasted" because of the Lake's saline character, and that its beneficial use is forever lost. [Finding 14; Clk. Tr. pp. 544-545.]

This finding does not sustain the judgment. It rests upon the provision of the Constitution of California declaring it to be necessary "that the water resources of the State be put to beneficial use * * *, that the waste * * * of water be prevented, and that [its] *conservation* is to be exercised with a view to the *beneficial use* thereof in the interest of the people and for the public welfare"; and further imposing (in consonance with the prior decisions on the extent of the appropriative right) the limitation to *beneficial use* "upon the right to water * * * from any stream * * * in this State." Prior to the decision and judgment whereof review is here sought, the Supreme Court of California had held that this inhibition upon the "waste of water" did *not* comprehend the natural discharge of water into a saline lake or into the Pacific Ocean. [See cases cited in the foregoing petition, p. 30.]

We have already pointed out that the constitutional amendment of 1928 did *not* change the rule of beneficial

use theretofore applied to appropriative water rights, but merely extended that rule to riparian rights. If, as the authorities cited clearly demonstrate, any surplus water in the Owens River watershed, over and above that necessarily to supply the needs of The City of Los Angeles, was subject to appropriation as of right by other appropriators, how can it be said that petitioners were under an *obligation* to take and *dispose* of the same, whether by finding other beneficial uses therefor, or by conserving it, or by wasting it? In respect of water not currently needed (including carry-over storage), the City not only has ***no*** *obligation* to take it but it has *no option* in that regard. The amount of water that it may take at any moment of time is limited to such as it "reasonably required for the *beneficial use* to be served," and the right so to take is by the Constitution defined as "*not* extend[ing] to the *waste*, or unreasonable use, or unreasonable method of use, or unreasonable method of diversion, of water." So long as any *surplus* over and above the water necessary to serve the City's needs is not availed of by other appropriators, the *right* thereto remains in Pothier's "negative community." How, then, can the diversion and disposal of this excess water constitute a burden that the City must bear in the interim in the interest of a *downstream proprietor?* If, in 1937, petitioners "wasted" water because, having no use for it, they did not take it, how can it be said that they could have *avoided* this waste by taking an additional 50,000 acre feet and running it out on the Mojave Desert and/or into the Santa Clara River,—even assuming (contrary to the fact), that they had *flowage rights* permitting them so to do? And if it had been permissible for petitioners to divert water merely to

waste it as indicated, how is it that this can be regarded as a "*conservation* with a view to *avoiding* waste?"

The Findings in question obviously proceed upon the wholly untenable theory that petitioners are, by the Constitution, compelled to take *active* measures in order to *avoid* the waste of *surplus* water entailed (according to the State court, adopting the view of respondent) by the *natural* discharge thereof into Owens Lake. Such so-called waste is one *imposed by nature* from the very beginning,—a waste materially *curtailed* by petitioners' operations. In short, it is not a *man-made* waste; and it is *only* man-made waste that falls under the prohibition of the Constitutional Amendment of 1928, Article XIV, Section 3.

We have treated the constitutional provision thus far as a prohibition of the "waste" of water, and in a sense so it is; but it will not be lost sight of that it is such a prohibition in terms of a declaration that the *right* to water is *limited* to such as "shall be reasonably *required* for the beneficial *use* to be served, and * * * does *not* * * * extend to the waste or unreasonable use" thereof. That is to say,—a *limitation* upon the appropriator's *right* is declared in terms of *use;* and as he *cannot use* the water until its diversion is an *accomplished fact*, the constitutional inhibition, which is in terms of a limitation on use,—has *no application* to any water *not diverted.*

The constitutional provision does *not, independent* of his use, impose on the appropriator a *duty*, by positive measures, to conserve water *not needed by him* in the interest of the State or of its individual citizens, inhabitants or property owners; and even if it had attempted so to do, the effort would have failed as violative of the due process

clauses of Article XIV, Section 1, of the Amendments to the Constitution of the United States, and of Article I, Section 13, of the Constitution of California, respectively.

The foregoing sufficiently presents the points relied upon by petitioners in support of their application herein. If the writs of certiorari prayed for be issued, petitioners purpose to invite this court's attention to certain additional erroneous rulings of the state court on points of general law having no jurisdictional significance. Accordingly, we submit a summary of such erroneous rulings without at this time presenting any argument or authorities thereon.

Erroneous Rulings of the Supreme Court of California on Points of General Law.

(1) The award of damages for loss of *prospective profits* was sustained notwithstanding the following facts:

(a) Respondent had had no profitable manufacturing *experience* in any year except 1934, and then in a plant and under a process *abandoned* in 1936 because of lack of brines suitable to be treated by that process.

(b) The two processes had *no* single operational step *in common*, and *no* apparatus performing the same *function* in each.

(c) The award was made on the basis of *90 tons* daily capacity in respondent's new plant which in fact was of *only 50* tons capacity until *after* the incursion of water upon the Lake in 1937 and was thereafter doubled.

(d) Respondent had in 1936 confessed inability to operate its new plant at a profit without such doubling of capacity, in an application made by it to the District Court of the United States under Section 77b of the Bankruptcy

Act for orders permitting it to finance the necessary enlargement of its new plant.

(e) The award of damages was made on the basis of this enlarged capacity by liberally discounting expenses incurred in operating at a loss in manufacturing 220 tons of soda ash in 1937 and 4053 tons in 1938 [Rep. Tr. pp. 22, 23-26], and on proof of sales by respondent of soda ash (by far the larger part of which was manufactured by others in Michigan and elsewhere) during the period 1937-1939, as follows:

1937, Total sales, 31,273 tons (of which 220 tons were manufactured by respondent),

1938, Total sales, 16,181 tons (of which 4,053 tons were manufactured by respondent),

1939, Total sales, 19,025 tons (of which no part was manufactured by respondent).

(2) The State court accords to respondent, under the equitable doctrine of estoppel, a right,—not measured by, nor commensurate with the conduct of petitioners held (erroneously) to have *created* such right,—but *transcending* such conduct by at least the difference between their maximum diversions prior to 1937 (or their current needs for water) and the natural flow of Owens River that could be accommodated within the capacity of the Los Angeles Aqueduct.[8]

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[8]For the rule that one successfully pleading an equitable estoppel thereby "acquires some *corresponding* right", see 3 Pomeroy Eq. Jur. [5th ed.], Sec. 804, p. 189, and notes at pages 181-183, 193-194, and 197, on *Horn v. Cole*, 51 N. H. 287; *Cornish v. Abington*, 4 Hurl. & N., 549, and *Stevens v. Dennett*, 51 N. H. 324.

Conclusion.

Upon the grounds set forth in the foregoing petition, as further develop in this brief, petitioners urge that the prayer thereof be granted and that, upon a full hearing thereafter, the said decision and judgment of the Supreme Court of California whereof review is here sought may be reversed by this Honorable Court.

Dated at Los Angeles, California, February 15, 1944.

Respectfully submitted.

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City Attorney;

S. B. ROBINSON,
Chief Assistant City Attorney for Water and Power;

SAMUEL POORMAN, JR.,
Assistant City Attorney;

A. E. CHANDLER,
Special Counsel;

By SAMUEL POORMAN, JR.,
Counsel for Petitioners.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A. D. 1944.

_____

_____

2-16-44—100

No. 723

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1943.

(Consolidated Causes: California Supreme Court, L. A. No. 18066)

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent.

(Superior Court No. 3783)

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent.

(Superior Court No. 3817)

APPENDICES A, B AND C.

Opinions Heretofore Rendered and Pertinent Constitutional and Statutory Provisions.

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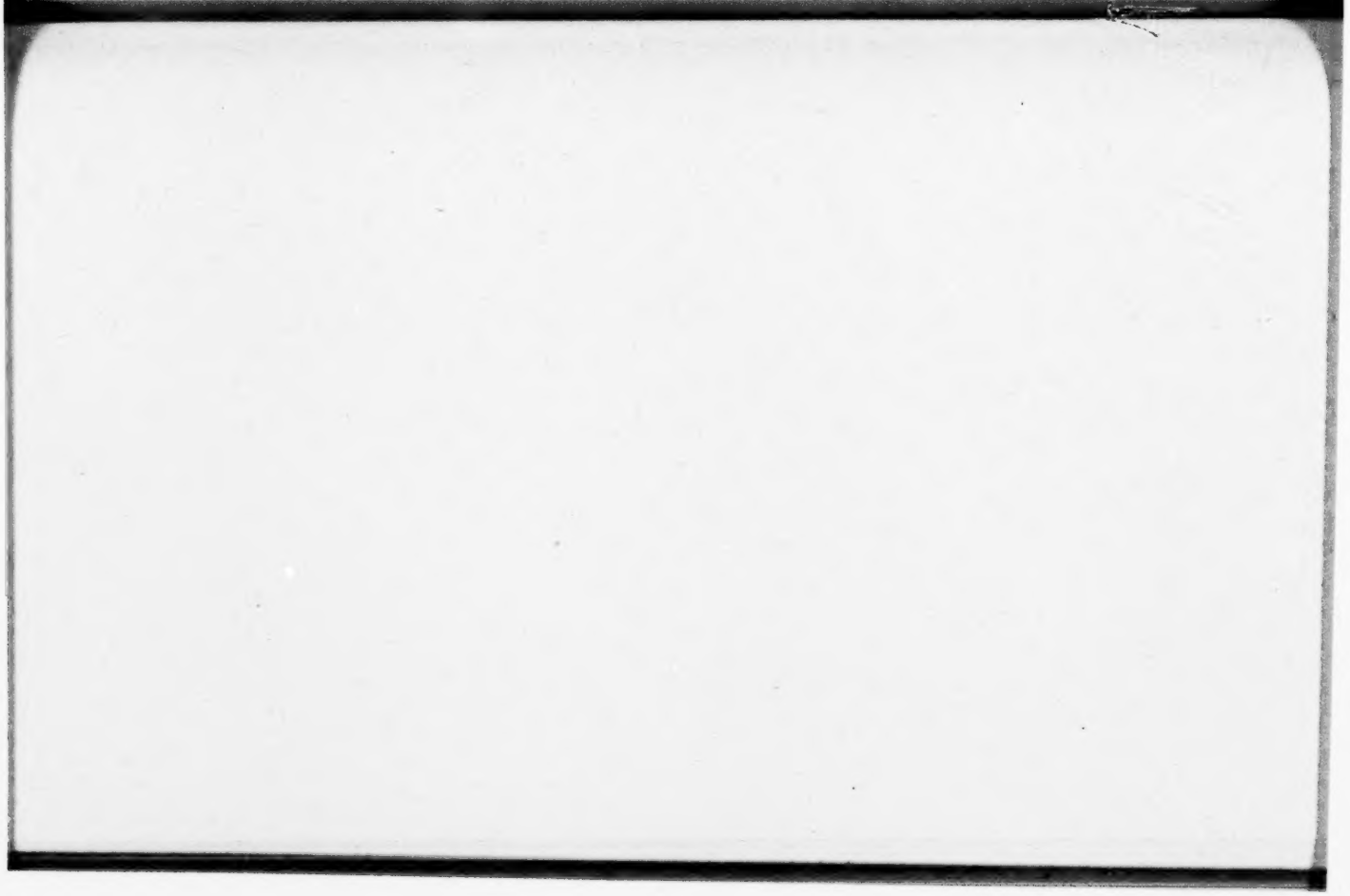

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APPENDIX A.

Filed Nov. 4, 1943, A. V. Haskell, Clerk.

[Reported in 23 A. C. 190. and also in 143 Pac. (2d) 12.]

See dissenting opinion.

In the Supreme Court of the State of California in Bank.

Natural Soda Products Company, a corporation, Plaintiff and Respondent, vs. City of Los Angeles, a municipal corporation, *et al.*, Defendants and Appellants.

Natural Soda Products Company, a corporation, Plaintiff and Respondent, vs. City of Los Angeles, a municipal corporation, et al., Defendants and Appellants. L. A. No. 18,066 (consolidated cases).

In 1913, the defendant City of Los Angeles completed its acqueduct to the Owens River Valley and, from 1919 to 1937, diverted into it virtually all the flow of the Owens River, which formerly emptied into Owens Lake, a body of salt water without outlet. As a result the lake dried up and its subsurface became a crystalline cake impregnated with brines containing valuable chemicals. On the shores of the dry lake plaintiff had two plants to which brines pumped from wells on the bed of the lake were piped for the production of soda products. Plaintiff acquired the older of the two plants in 1932, when it leased mineral rights in the lake from the State of California. Plaintiff subsequently extended its pipe lines several miles farther along the bed of the lake, drilled wells, and installed pumps and brine heaters, acquiring the necessary leases and rights of way from the state. The brines thus made available were of higher alkalinity

and therefore of greater value than those previously obtained. To improve its efficiency in extracting chemicals from the brines so as to increase production, plaintiff built a new plant and adopted a new process.

Plaintiff's operations were possible because of the dehydrated state of the lake bed, the continuation of which depended on the absence of any substantial flow of water from Owens River into the lake. The extent of the flow was determined by the manner in which defendant operated its aqueduct. Its dam across Owens Valley, forming Tinnemaha Reservoir, served to regulate the flow of the river. Below the dam, the water, which flowed through its natural channel until it reached Intake, could be directed into the aqueduct proper by means of defendant's diversion dam, or into Owens Lake if the gates in the dam were opened.

On February 6, 1937, before plaintiff's new plant could be put into operation, defendant opened the gates at Intake, thereby causing a large amount of water to flow into the lake. Defendant continued to direct the water into the lake intermittently until July 1, 1937, and the surface of the lake became flooded to a depth of three or four feet. The water inundated much of plaintiff's plant, causing substantial physical damage and reducing the alkalinity, and therefore the value, of the subsurface brines by keeping them at a low temperature. As its properties were wholly inaccessible until July, 1937, and partly so until September, 1937, plaintiff was unable to resume operations until October, 1937. Defendant released altogether approximately 50,000 acre feet of water into the lake. There was evidence that it could have stored some of this water in Tinnemaha Reservoir for later release down the Santa Clara River or onto the

Mojave Desert, and could have spread the remainder in the Owens River Valley.

On December 17, 1937, plaintiff brought suit for an injunction. On December 30, 1937, plaintiff's claim for damages was received by the mailing clerk of the water department, and upon its rejection plaintiff filed its action for damages. These actions were consolidated for trial. The injunction was denied, and judgment was entered awarding plaintiff $153,578.85. From this judgment defendant appeals.

It is generally recognized that one who makes substantial expenditures in reliance on long-continued diversion of water by another has the right to have the diversion continued if his investment would otherwise be destroyed. (*Chowchilla Farms Inc. v. Martin*, 219 Cal. 1; *Matheson v. Ward*, 24 Wash. 407; *Pere Marquette Ry. Co. v. Siegel*, 260 Mich. 89; *Mathewson v. Hoffman*, 77 Mich. 420; *Kray v. Muggli*, 84 Minn. 90; *Peter v. Caswell*, 38 Oh. St. 518; *Delaney v. Boston*, 2 Har. (Del.) 489; *Shepardson v. Perkins*, 58 N. H. 354; *Hammond v. Antwerp Light & Power Co.*, 230 N. Y. S. 621, 634; *Ford v. Whitlock*, 27 Vt. 265; *Smith v. Youmans*, 96 Wisc. 103.) Thus in the *Chowchilla Farms* case the court held, in recognition of the rights of those with lands riparian to a changed channel, that the flow could not be returned to its former bed. It has also been held that the rights of those who improve land previously submerged would be infringed if the land were submerged again (*Mathewson v. Ward, supra;* see cases collected in 88 A. L. R. 142, *et seq.; San Gabriel V. C. Club v. Los Angeles*, 182 Cal. 392, 397.) A change in the flow of a stream that appears to be permanent usually leads to costly adjustments by those interested, as they come to

regard the artificial condition as permanent. It is therefore reasonable that they should receive as much protection as if the condition were natural. (See *Chowchilla Farms Inc. v. Martin, supra,* and cases there cited.)

Some jurisdictions do not afford this protection if the diversion can be continued only by maintaining a structure such as a dam (*Drainage Dist. v. City of Everett,* 18 P. (2d) 53 [Wash.]), apparently because it would be an excessive burden for one to maintain a dam that is of no further use to him. When the owner maintains the dam but alters the flow to increase his profit at the expense of those below him, or merely to be arbitrary, it is reasonable to require that the alterations shall not injure those who have relied on the customary operation of the dam in the past. (*Kray v. Muggli, supra; Smith v. Youmans, supra; Pere Marquette Ry. Co. v. Siegle, supra; Hammond v. Antwerp Light & Power Co., supra;* see *Ice Co. v. LaPlant,* 136 Iowa 621, 633; *Greisinger v. Klindhardt,* 321 Mo. 186; *Mitchell Drainage Dist. v. Farmers Irrigation Dist.,* 127 Neb. 484.)

In the present case defendant not only diverted the flow of the Owens River for many years, but augmented it by such activities as the digging of wells and drainage ditches, so that the diversion appeared to be permanent. The gates in defendant's dam did not dispel the impression of permanence, for it was evident from the continued dryness of the lake that they were kept closed. Reliance on the permanence of the diversion was therefore natural; moreover, it was highly desirable, for it motivated the development of natural resources of substantial value. The findings, amply supported by the evidence, establish that defendant could easily have found an outlet for the surplus water instead of causing it to

flow into the lake. While the flow of water was unusually large for a brief period, it would have been within the capacity of the acqueduct had it been stored temporarily in available space, and gradually released where it could do no harm. Defendant attempted to prove that it released the water with a high boron content to lower the boron content of the water flowing into the acqueduct. There was evidence, however, that the boron content of the water used by defendant had never been high and that it was not substantially lowered by releasing the water. In any event, defendant could have released the boron-bearing water elsewhere. These findings are sufficient to establish liability, and it is therefore unnecessary to consider the additional finding that defendant was negligent in failing to construct sufficient headwater storage.

Defendant contends that since an appropriative right is limited by the needs of the appropriator (Cal. Const., art. XIV, sec. 3; Civ. Code, sec. 1411), it was under an obligation to release the water that it did not need into the Owens River channel at Intake. These constitutional and statutory provisions, designed to insure a reasonable division of a limited water suppiy, have never been construed as requiring a particular disposition of surplus water, least of all a disposition harmful to the recipient. The constitutional mandate forbidding "the waste or unreasonable use of water," far from requiring, actually forbids a disposition that would entail not only waste of water but damage to valuable natural resources.

Defendant also contends that as a riparian owner it had the right to the full flow of the Owens River past its lands below Intake. Such a right, however, would clearly exceed that allowed by the Constitution, which provides that "The right to water . . . shall be limited to such

water as shall be reasonably required for the beneficial use to be served . . ." (Cal. Const., art. XIV, sec. 3), for defendant makes no claim that it has any beneficial use for the water.

In addition to other items, plaintiff was awarded damages for loss of profits, which defendant contends was not proved with certainty. The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. If no such basis exists, as in cases where the establishment of a business is prevented, it may be necessary to deny such recovery. (*California P. Mfg. Co., Inc. v. Stafford Press Co.*, 192 Cal. 479, 485; *Gibson v. Hercules Mfg. Co. Inc.*, 80 Cal. App. 689.) If, however, there has been operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded. (*Sobelman v. Maier*, 203 Cal. 1, 9; *Pacific etc. Co. v. Packers Ass'n*, 138 Cal. 632; *Landon v. Hill*, 136 Cal. App. 560; *Pye v. Eagle Lake Lumber Co.*, 66 Cal. App. 584; *Hacker v. Chapman Mfg. Co.*, 17 Cal. App. (2d) 265.) In the present case plaintiff's probable gross receipts could be estimated from its sales in the preceding two years, in view of the evidence that prices were stable. Its unit costs could be estimated on the basis of detailed figures concerning actual expenses, such as labor, depreciation, insurance, taxes, and royalties for the limited operations carried on in 1938. Its plant capacity was conservatively estimated at 90 tons per day, since plaintiff's old plant, using the "carbonating process" had a proved capacity of from 35 to 40 tons a day, and the capacity of the new "Mono Process" plant had been increased from 50 to 100 tons a day. Awards of prospec-

tive profits have been sustained on the basis of much less satisfactory evidence. (See *Pacific etc. v. Packers Ass'n, supra; Shoemaker v. Acker*, 116 Cal. 239; *Hacker v. Chapman Mfg. Co., supra; Landon v. Hill, supra; Story Parchment Co. v. Paterson Co.*, 282 U. S. 555; *Barrett Co. v. Panther Rubber Co.*, 24 F. (2d) 329.) Since defendant made it impossible for plaintiff to realize any profits, it cannot complain if the probable profits are of necessity estimated. (*Sobelman v. Maier, supra*, at p. 9; *Schumann v. Karrer*, 184 Cal. 50, 57; *Meer v. Cerati*, 53 Cal. App. 497.)

Defendant relies on the fact that in the years immediately preceding the flooding plaintiff did not make a profit. A comparable problem was presented in *Buxbaum v. G. H. P. Cigar Co.*, 188 Wisc. 389, where the defendant broke a contract giving the plaintiff a right to sell cigars of the defendant's manufacture. Although no profit had previously been recovered from the sale of the cigars, the plaintiff was able to show that its expenses in the year the contract was broken were low enough to have permitted a gain from sales in that year, and recovery of prospective profits was allowed. In the present case plaintiff was engaged during the two years immediately preceding the tort in converting its plant, and it maintained its sales position by selling soda products purchased elsewhere. The court might well have concluded that profits were probable, since the completion of alterations enabled plaintiff to sell products from its own plant.

Defendant contends that plaintiff's damages should be determined on the basis of opinion evidence concerning the value of plaintiff's properties before and after the tort. While this method is the usual one for determining damages for trespass to real property, it yields to others

if they are more appropriate to a particular situation. (See *McCormick, Damages*, p. 482, *et seq.*; 15 *Am. Jur.* 514.) In the case of a reparable injury, a frequent measure of damages is the cost of making repairs plus the value of the use of the premises for the period during which the tort has deprived the owner of the property. (*Linforth v. S. F. Gas & Electric Co.*, 156 Cal. 58; *Green v. General Petroleum Corp.*, 205 Cal. 328; *Higgins v. L. A. Gas & Electric Co.*, 159 Cal. 651, 662; *Kell v. Jansen*, 53 Cal. App. (2d) 498.) Similarly, in the present case damages were given for the physical destruction resulting from the tort, and the value of the use of plaintiff's properties was properly estimated on the basis of the probable profits that would have been derived from their operation. Moreover, plaintiff's properties are a complex aggregation of real and personal property, of pumps, plant, pipe lines, and mineral rights. It is common knowledge that such plants do not frequently change hands, and that in a sale the price is likely to be based on considerations peculiar to the plant. Expert opinion as to the market value of such a plant is likely to be based on nothing more substantial than the probable returns from the operations of the plant. A more accurate assessment of damage can be obtained by estimating loss of profits directly. (*Inyo Chemical Co. v. City of Los Angeles*, 5 Cal. (2d) 525; *Teller v. Bay & River Dredging Co.*, 151 Cal. 209; *Sacchi v. Bayside Lumber Co.*, 13 Cal. App. 73, 84; see *Weill, "Value of the Use," in Non-Renting Localities*, 13 Cal. L. Rev. 373.)

Defendant invokes section 363 of the Charter of Los Angeles, providing that "Every claim and demand against the city shall be first presented to and approved in writing by the board, officer or employee authorized by this

charter to incur the expenditure or liability represented thereby," and section 376, providing that "No suit shall be brought on any claim for money or damages against the City of Los Angeles, or any officer or board of the city, until a demand for the same has been presented, as herein provided, and rejected in whole or in part . . . Except in those cases where a shorter period is otherwise provided by law, all claims for damages against the city must be presented within six (6) months after the occurrence from which the damage arose . . ." Plaintiff presented his claim by mailing a copy of it to the Department of Water and Power. Upon receiving it the mailing clerk of the department gave it to the chief clerk of the legal division, who forwarded it to the deputy city attorney in charge of water matters, and the latter sent it to the board of water commissioners, advising its rejection.

It is settled that the board of water commissioners is "the board . . . authorized by this charter to incur the expenditure" here involved. (*Douglass v. City of Los Angeles*, 5 Cal. (2d) 123, 134; *Continental Ins. Co. v. City of Los Angeles*, 92 Cal. App. 585; see *Huey v. City of Los Angeles*, 137 Cal. App. 48.) It is likewise settled that the requirement that a claim be presented to such a board is satisfied by presentation to a subordinate who represents the board for the receipt of such claims from the public. (*Douglass v. City of Los Angeles, supra; McCandless v. City of Los Angeles*, 10 Cal. App. (2d) 407; *Sandstoc v. Atchison T. & S. F. Ry. Co.*, 28 Cal. App. (2d) 215.) It is the function of the board to supervise the water department, which operates the waterworks of Los Angeles and controls the water revenue fund (Los Angeles Charter, sec. 71; 220(1)(7)), and the members

of the department are therefore the subordinates of the board and may represent it in receiving claims. (*McCandless v. City of Los Angeles, supra;* see *Douglass v. City of Los Angels, supra,* at p. 134.) A claim may be presented by registered mail, as in the present case (see *Metcalf v. Metropolitan Life Ins. Co.*, 1 Cal. App. (2d) 481), and the mailing clerk of the water department is the subordinate charged with receiving claims so presented. The fact that the claim passed through many hands before it was actually considered by the board of water commissioners signifies merely that the board wished to be advised of the merits of claims before considering them. Defendant's claim was therefore filed with the appropriate officer.

The question remains whether it was filed "within six months after the occurrence from which the damage arose." Beginning on February 6th, defendant opened the gates in its dam intermittently until the last day of June. The water reached its peak in May, and did not entirely disappear until some time in September. The claim was filed on December 30.

The principal purpose of the requirement that claims be filed is to provide the city with full information concerning rights asserted against it, so that it may settle those of merit without litigation. (*Western Salt Co. v. City of San Diego*, 181 Cal. 696, 699; *Sandstoe v. Atchison T. & S. F. Ry. Co.*, 28 Cal. App. (2d) 215, 223; see 18 *Cal. Jur.* 1109.) That purpose is best served if the entire sequence of events giving rise to the injury is

regarded as the "occurrence from which the damage arose," for damages can be assessed accurately only when the sequence is completed and the total injury taken into account. Thus, in the present case the injuries continued to accumulate but were not entirely apparent so long as water remained on the lake bed. (See *Haigh v. City of Los Angeles,* 139 Cal. App. 595.)

Defendant contends that the case of *Powers Farm v. Consolidated Irrigation District,* 19 Cal. (2d) 123, requires a different construction of the charter provision. That case, however, involved a different statute, and since no claim had been filed the court was concerned with determining, not the time within which a claim had to be filed, but whether the presentation of any claim was required. To hold that plaintiff was required to present a claim for the entire damage to its property by September 6th, six months after the initial flooding established the inevitability of damages, would require an unreasonable construction of the language of the charter provision, for the last flooding contributed to the injury as well as the first, and it would therefore be inaccurate to say that the first flooding was "the occurrence from which the damage arose." Moreover, the lake was still partially inundated on September 6th, and some of the damage was yet to occur. Since plaintiff's plant was wholly inaccessible until July, and partly so until September, plaintiff would have had only a brief interval in which to ascertain and evaluate the damage and could hardly have prepared a claim by September 6th, in compliance with the charter provision

that "No demand can be approved . . . unless it specify each several item, with the date and amount thereof." (Los Angeles Charter, sec. 368.) Hence, if plaintiff were required to present a claim by that date, the charter would have the effect of denying plaintiff the right to recover for much of the injury to his property. The state Constitution, however, provides for the right to compensation for the damaging of property for the public use (Cal. Const., art. I, sec. 14). A municipality can prescribe reasonable procedures for the enforcement of this right (*Crescent Wharf etc. Co. v. City of Los Angeles*, 207 Cal. 430), but cannot enact legislation that would operate to prevent or unduly hamper the enforcement of such a right. (*Douglass v. City of Los Angeles*, 5 Cal. (2d) 123, 128; *Geimann v. Board of Police Comm'rs*, 158 Cal. 748; see *Rafferty v. City of Marysville*, 207 Cal. 657, 665; see 5 *Cal. Jur.* 780; 34 *Am. Jur.* 32.) The same considerations apply to defendant's contention that plaintiff was required to file its claim within six months from the day in May that the water reached its peak. Additional water was released after that day augmenting the injury.

Defendant contends that plaintiff's rights are barred on the ground that it failed to comply with the statute providing that "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works, or property, a verified claim shall be presented with the clerk . . . of

the legislative body of the municipality . . . within ninety days after such accident has occurred." (Stats. 1931, p. 2495, *Deering's Gen. Laws*, Act 5149.) This statute is inapplicable, however, for the damage in the present case arose, not from the dangerous condition of any public property, but from defendant's acts. (*Ogando v. Carquinez G. School Dist.*, 24 Cal. App. (2d) 567; *Jackson v. City of Santa Monica*, 13 Cal. App. (2d) 376.)

Defendant invokes as statutes of limitation sections 315, 316, 320, 338(2), 339(1), and 343 of the Code of Civil Procedure. Sections 315 and 316 relate to the acquisition of title by adverse possession, but defendant has submitted no evidence that it has acquired such title. Section 320 relates to certain rights under Mexican Land Grants (see the note by the Code Commissioners in Code Civ. Proc. 1872, sec. 320) and is inapplicable here. Plaintiff's action was brought well within the period prescribed by the other sections.

The judgment is affirmed.

TRAYNOR, *J.*

We concur:

GIBSON, *C. J.*,
CURTIS, *J.*,
CARTER, *J.*,
SCHAUER, *J.*

See Dissenting Opinion.

Natural Soda Products Co. v. City of Los Angeles
L. A. No. 18,066.

DISSENTING OPINION.

I dissent:

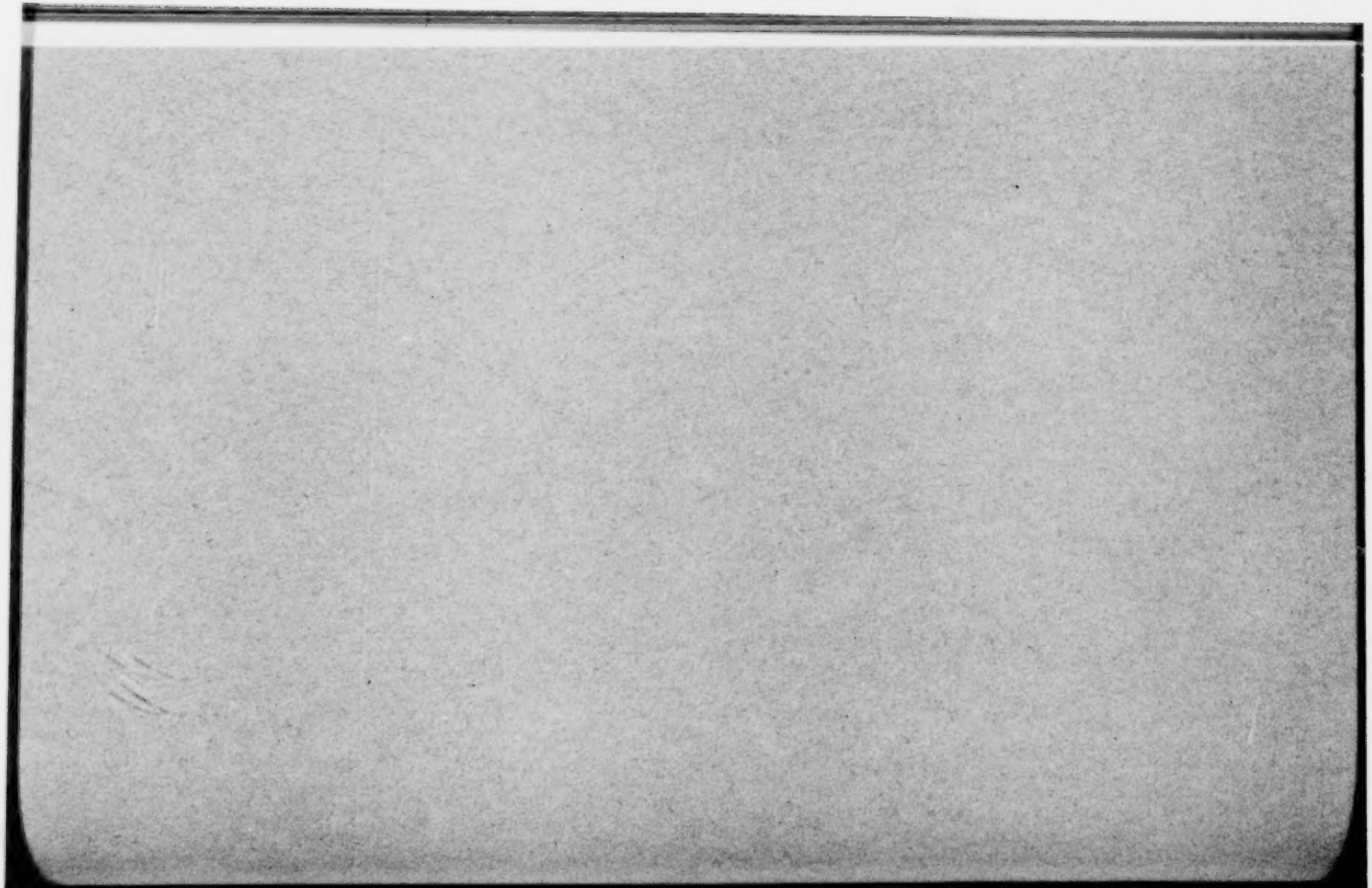
The prevailing opinion holds that the requirement that a claim be presented within six months "after the occurrence from which the damages arose" is met when the claim is presented within six months after the last of a series of occurrences which caused the damage, and, presumably, that recovery may be had for the entire damage including the damage arising from acts occurring more than six months prior to the presentation of the claim. I agree that a claim may properly be presented within six months from the last occurrence giving rise to damage but I do not agree with the holding that recovery may be had for damage arising from occurrences which happened prior to the beginning of the six months period.

The purpose of the requirement for filing claims is not only to provide the municipality with information so that it may settle claims without litigation. Another very important purpose, in a case of continuing damage, such as the present one, is to give the city an opportunity to provide protection against damage by the continued acts complained of, should it deem itself liable. Therefore the rule stated in *Powers Farms v. Consolidated Irr. Dist.* 19 Cal. (2d) 123, 129, that "where the time and extent

of injury are uncertain, a statutory period of limitations begins to run when the fact that damage is occurring becomes apparent and discoverable, even though the extent of the damage may still be unknown," has a sound basis in reason and justice. If, as was apparent in the present case, a continuation of the acts would result in a loss to the plaintiff, either total or partial, both reason and justice required that the municipality be apprised of the first occurrence causing damage at least within the time required by law, rather than that the plaintiff be permitted to remain silent until the damage mounted to a total loss. To hold the plaintiff thus to the requirement is not at all to effect a disregard of the language of the charter provision. On the contrary, it is a compliance with the plain terms thereof. It does not follow that to require compliance would be to deprive the plaintiff of a constitutional right to compensation for damaging private property for public use. It is settled that although the constitutional provision is self-executing, the legislature may properly set up a procedure for the recovery of the damages, and that the filing of a claim within a specified period of limitations is a proper step in such procedure. "Although the Constitution grants the right to compensation, it does not specify the procedure by which the right may be enforced. Such procedure may be set up by statutory or charter provisions, and when so established, a failure to comply with it is deemed to be a waiver of the right to compel the payment of damages." (*Powers*

Farms v. Consolidated Irr. Dist., supra, 19 Cal. (
123, 126; *Davis v. East Contra Costa Irrigation D*
19 Cal. (2d) 140; *Rose v. State of California,* 19
(2d) 713, 725; *Crescent Wharf & Warehouse Co. v.*
Angeles, 207 Cal. 430; *Los Angeles Athletic Club v. L*
Beach, 128 Cal. App. 427.)

SHENK,



APPENDIX B.

[Dist. Court of Appeal—Fourth Dist. Filed Dec. 14, 1942. M. C. Van Allen, Clerk.]

[Reported in 56 A. C. A. 108, and also in 132 Pac. (2d) 553.]

In the District Court of Appeal, in and for the Fourth Appellate District, State of California.

Natural Soda Products Company, a corporation, Plaintiff and Respondent, vs. The City of Los Angeles, a municipal corporation; Department of Water and Power of the City of Los Angeles, Defendants and Appellants.

Natural Soda Products Company, a corporation, Plaintiff and Respondent, vs. City of Los Angeles, a municipal corporation; Department of Water and Power of the City of Los Angeles, Defendants and Appellants. Civil No. 2981.

OPINION.

Appeal from a judgment of the Superior Court of Inyo County, Hon. Wm. D. Dehy, Judge. Judgment reversed.

For Appellants: Ray L. Chesbro, City Attorney; S. B. Robinson, Chief Assistant City Attorney for Water and Power; Samuel Poorman, Jr., Assistant Attorney; Robert E. Moore, Jr., and Rex B. Goodcell, Jr., Deputies City Attorney; A. E. Chandler, Special Counsel. By Samuel Poorman, Jr.

For Respondent: Kenneth Ferguson, Jess G. Sutliff.

Amicus Curiae: Earl Warren, Attorney General; Everett W. Mattoon, Assistant Attorney General; Burdette J. Daniels, Deputy Attorney General.

This is an appeal from a judgment denying plaintiff an injunction to restrain defendants from permitting water to flow into Owens Lake in Inyo County, and awarding plaintiff $153,573.85 damages caused by waters from the Owens River flooding Owens Lake.

The action seeking an injunction was filed on December 17, 1937. An amended complaint was filed on which the cause went to trial. It was alleged that Owens Lake, which belongs to the State of California, is situated in the westerly part of Inyo County and, prior to the past twenty years, was fed by the waters of the Owens River which had its headwaters in Mono County and flowed southerly into Owens Lake; that defendants constructed an aqueduct in connection with the water supply of the City of Los Angeles; that this aqueduct headed in Owens River, a number of miles north of Owens Lake; that by means of this aqueduct all of the water was diverted from the Owens River; that thereupon Owens Lake commenced to dry up and became "substantially dried up"; that its subsurface waters thereby acquired a degree of salinity and were impregnated with salts of considerable value; that plaintiff, relying on the continued diversion of the waters of the Owens River and the continuance of Owens Lake as a dry lake, acquired property on the banks of Owens Lake and in its bed and improved the same at a cost of more that $500,000.00; that it acquired leases on the bed of the lake from the State of California; that on December 15, 1937, while plaintiff was engaged in its business of pumping the subsurface waters from the Owens Lake and extracting chemicals therefrom, defendants suddenly ceased diverting the waters of the Owens River into its aqueduct and "commenced to divert said waters or a substantial part thereof into Owens Lake"

and to "threaten to continue to divert the waters of said Owens River out of said aqueduct and into Owens Lake" thereby diluting the subsurface waters and irreparably damaging plaintiff's property and business.

On May 28, 1939, plaintiff filed its action to recover damages caused by the flooding of Owens Lake by the waters of Owens River. A second amended complaint was filed (which we will refer to as the complaint) upon which the action went to trial. The actions were consolidated for trial and are presented here on a single record.

This complaint in the damage action contained two counts. The first repeated the material allegations of the action for injunction and enlarged on them. It also alleged the particular properties of plaintiff and the damages it suffered from the flooding of Owens Lake.

It alleged the construction of the aqueduct, the taking of the water of the Owens River and the consequent drying up of Owens Lake; "that in reliance upon said condition and upon the continued diversion of said waters of said Owens River by defendants into said aqueduct" plaintiff purchased its described properties about April 15, 1932, improved these properties, acquired others, and operated its works for the extraction of soda ash and kindred products from the subsurface waters of Owens Lake; that the aqueduct was a permanent structure and constituted a permanent new channel for the waters of the Owens River.

> It was particularly alleged "that the evaporated condition of said Owens Lake and the resultant alkilinity of subsurface brines of said Owens Lake are absolutely necessary to plaintiff's operations, which are predicated thereupon, and are of extreme

value to plaintiff; and that, until the diversion of waters onto and the flooding of Owens Lake by defendants, as hereinafter set forth, said Owens Lake was, and for many years had been, in a dried up and evaporated condition so that its subsurface brines were, during the cold fall and winter months of each year, high in alkalinity and available to plaintiff for its continued operations predicated thereupon.

"That at all times since April 15, 1932, when plaintiff acquired its said improved properties on Owens Lake, defendants have known of plaintiff's ownership thereof and of the large, conspicuous, substantial, and permanent character of plaintiff's plant and property, and that plaintiff's operations depend upon the continuance of Owens Lake as a dry and evaporated lake, and that plaintiff has and does in the conduct of its operations maintain expensive pumps, pipelines, power lines, roads, and other plant equipment upon the bed of and on lands riparian to Owens Lake, and that plaintiff acquired said properties and plant and has made its improvements thereupon all in reliance upon the continued maintenance of Owens Lake as a dry and evaporated lake; that the foregoing facts are known, and at all times hereinafter mentioned were known, to defendants . . .

"That at divers times, commencing during the first week in February, 1937, and continuing throughout the year 1937 and to and including December, 1937, . . . defendants suddenly ceased to so transfer and conduct the waters of said Owens River into said aqueduct, and suddenly and without plaintiff's consent, . . . defendants persisted in diverting said waters out of said aqueduct and into said Owens Lake until and so that the bed of said Owens Lake and a substantial portion of aforesaid plant and

properties of plaintiff were, at places normally and theretofore dry and exposed, flooded to the average depth of between three and four feet for the period commencing February, 1937, and continuing until December, 1937, and made wholly inaccessible to plaintiff for the period commencing February, 1937, and continuing until July and August, 1937."

The second cause of action in the damage action repeated many of the allegations of the first cause of action and alleged that the diversion of the waters from the aqueduct was wantonly, negligently and carelessly done. It was further alleged that means of disposing of these waters were available to defendants but were not used by them.

The State of California, through the Attorney General, appeared in the trial court as *amicus curiae* and has filed a brief here. California is the owner of the lake and licensor of certain rights in the subsurface brines of Owens Lake and had received royalties from plaintiff and others who extracted chemicals from those brines. The State maintains that the value of its brines were lessened by the fresh waters flowing into Owens Lake from Owens River.

Defendants argue at considerable length that the complaints do not state facts sufficient to constitute causes of action. As the same questions are involved in a consideration of the sufficiency of the evidence to support the judgment we prefer to go to the merits of the case.

The trial judge found the facts in favor of plaintiff. He denied the injunction on the grounds that the injuries were compensable in damages in an action at law and that an injunction would cause great injury to defendants.

The trial court particularly found that the defendants "had appropriated, in excess of 4000 second feet mean annual flow of water from Owens River and its tributaries, which appropriated amount is greater than any recorded mean annual flow of water in Owens River and its tributaries" (the evidence discloses this appropriation to be several times the mean annual flow of water); that "defendants took all, or substantially all, of the water from Owens River and its tributaries into their aqueduct system"; that defendants acquired virtually all of the lands riparian to Owens River and virtually all the water rights and water-bearing land, and virtually all of the extensive irrigation and water spreading facilities in Owens Valley and discontinued their use so that the agricultural land in the valley returned to "a general state of non-productivity, desert-like in character"; that they dug many wells and pumped a substantial part of the underground waters into the aqueduct system; that "during said many years prior to both 1932 and 1937, and by defendants' taking and exclusion of water from the extensive agricultural lands of Owens Valley which had theretofore enjoyed it, defendants materially affected and increased the flow of water in the lower reaches of the Owens River and drastically and radically changed the physical situation in the Owens Valley with respect to water and the flow and regimen of the Owens River from that which had obtained prior to defendants' said acts, and prior to the many years prior to both 1932 and 1937."

It was further found that "for many years prior to both 1932 and 1937 defendants took all or substantially all of the flow of the Owens River into their said aqueduct system and virtually none of said water was diverted therefrom or permitted to flow onto the exposed dry lake bed

of Owens Lake; . . . that by their said manner of construction, use, and operation of their said aqueduct system and its appurtenant facilities and their said overt acts and conduct, as aforesaid, for many years preceding both 1932 and 1937, defendants, and each of them, evidenced their intention and design to take, and did take, and represented in fact and deed that they would take, and led all interested persons to reasonably believe that they would take and continue to take, into their said aqueduct system, all of the flow of Owens River which they could take up to the reasonable capacity of said aqueduct system and its appurtenant facilities, reasonably constructed and reasonably operated"; that plaintiff relied on this conduct in the purchase and improvement of its plant and because of these representations by conduct for many years believed that Owens Lake would remain a dry lake; that the works of defendant were permanent and constituted a new channel for Owens River. It was also found that defendants were negligent in the construction and operation of their aqueduct system.

We find the following in the conclusions of law:

> "That defendants' aqueduct system and defendants' taking of the flow of Owens River through said aqueduct system were and are, and were and are fully intended by defendants to be, permanent in nature, construction, and operation; that plaintiff was and is entitled and had and has the right to, and did and does, rely upon the permancy of said aqueduct system and upon said aqueduct system being operated as it had been operated for many years prior to both 1932 and 1937 so that the bed of Owens Lake was dry and exposed; that plaintiff was and is entitled, and had and has the right to, and did and does, rely upon defendants' continued use and taking of the

flow of Owens River up to the reasonable capacity of an aqueduct system reasonably constructed and reasonably operated by defendants without diverting and flooding any of the same upon Owens Lake; and that in consequence thereof and of such right to rely, plaintiff did, so relying, acquire the substantial plant and properties in the course of the former natural flow of the Owens River more particularly referred to in the foregoing findings of fact.

"That defendants, having changed the natural flow of Owens River, and having diverted and taken substantially all of the flow of Owens River into their aqueduct system for a substantial period of time and under the circumstances set forth in the foregoing findings of fact, had and have no right to change the nature of that established diversion and taking as they did in the spring and summer of 1937 because such change did and will destroy and interfere with plaintiff's rights which have accrued."

At the commencement of the present century, the City of Los Angeles was outgrowing its then domestic water supply, the Los Angeles River, and turned to the Owens Valley for relief from the coming shortage. It acquired water rights there and built the Los Angeles Aqueduct which headed in the Owens River about forty-five miles north of Owens Lake and terminated in the San Fernando Valley. This aqueduct was put in operation in 1913 and thereafter about seventy-five per cent of the water supply of the city was obtained from the aqueduct and twenty-five per cent from the Los Angeles River. A small part of the Owens River water was used to replace water rights of farmers in the San Fernando Valley who, in exchange, had conveyed their riparian rights in the Los Angeles

River to the city. Otherwise the entire supply was used for domestic and municipal purposes.

A weir was built across the Owens River to raise the river water to the level of the aqueduct. The intake of the aqueduct is equipped with gates which, when open, admit the gravity flow of the river and can be closed to exclude all water and permit it to flow down the channel of Owens River which terminates and empties into Owens Lake. Owens Lake originally covered an area of about 65 square miles and has no outlet so that its waters have been saline in so far as available records disclose.

The aqueduct had a capacity of 800 second feet from Intake to Haiwee Reservoir which is a few miles south of Owens Lake. Haiwee is a storage reservoir with a capacity of 58,525 acre feet of water. South of the reservoir the aqueduct originally had a capacity of 400 second feet which was later increased to 480 second feet. Defendants argue that these capacities are theoretical and that due to natural causes its actual capacity is ten per cent below these figures. The aqueduct runs along the westerly side of Owens River and Owens Lake. Ever since its construction it has been equipped with gates situated between Intake and Haiwee Reservoir so that the entire flow can be diverted into Owens River.

Owens River finds its source in the eastern slope of the Sierra Nevada Mountains in Mono County. It is fed by four or five streams in Mono County and by about twenty streams in Inyo County. Generally these streams enter the river from the west and carry water resulting from rains and melting snow. The river has always had a defined channel to its terminus in Owens Lake.

In 1929 defendants completed Tinnemaha Reservoir. This was constructed by building an earth fill across the river. It had a capacity of 16,405 acre feet. It was constructed as a regulating reservoir and not for storage of water. Normally water passed through pipes at the base of the dam and down the channel to the intake of the aqueduct. There were gates on these pipes that could be closed. During periods of high water any surplus could pass over spillways on the top of the dam.

Plaintiff in its arguments, and the findings treat the Tinnemaha Reservoir and the river channel below it down to Intake as part of the aqueduct system. Defendants regard the aqueduct as commencing at Intake. This accounts for the extended arguments of counsel as to whether the high waters of 1937 and subsequent years were diverted out of or excluded from the aqueduct at Intake. We regard this controversy as unimportant.

The evidence discloses that defendants never diverted the entire flow of the river into the aqueduct at Intake except in one year and perhaps two others. In all other years some water ran down the channel of the river to the lake. Plaintiff admits an annual flow into the lake of about ten second feet. There is no finding of the diversion of all the flow of the river into Intake except for the one year. In years of high water a very substantial part of the flow of the river found its way into the lake. In 1916 the river flow was 487,000 acre feet, of which 96,000 acre feet were taken into the aqueduct. In 1917 the river flow was 353,000 acre feet, of which 124,000 acre feet were taken into the aqueduct. In 1922 the flow was 360,000 acre feet with 250,000 acre feet taken into the aqueduct. In 1937 the flow was 368,000 acre feet with 271,000 acre feet taken into the aqueduct. In 1938 the flow was 565,000

acre feet with 288,000 acre feet taken into the aqueduct. The measurements of the river flow were taken at Charlies Butte several miles above Intake, and the measurements of the flow into the aqueduct were taken at or near Intake. (All water measurements given in this opinion are approximations and not exact.)

A cycle of water scarcity in the Owens River watershed started in about 1919, a number of years before plaintiff acquired its property, and extended for several years thereafter. The deficient water supply was continuous with the exception of isolated years. To supplement its water supply defendants drilled a number of wells from which water was pumped during years of scarcity. During years of plentiful water pumping was stopped though some of the wells flowed.

The theory on which the judgment is based is this: That the aqueduct, being a permanent structure, constituted a new channel for the waters of Owens River; that the existence and use of this new channel was acquiesced in for many years by all parties concerned; that the conduct of defendants over these years, which was acquiesced in by others, constituted representations to the others on which they were entitled to rely; that defendants would take water into the aqueduct up to its reasonable capacity and reasonable operation so that none of those waters would reach Owens Lake.

In this connection it should be noted that defendants had never used the aqueduct to its full continuous capacity. The lowest recorded river flow was 158,000 acre feet in 1924 when all of the flow was taken into the aqueduct. The next lowest flow was 189,000 acre feet when most of the water was taken. In other years the river flow varied as did the amount of water taken by defendants.

In none of them did defendants take all of the river flow and in some of them the flow into Owens Lake through the river channel was very substantial. To illustrate, the river flow into Owens Lake was over 200,000 acre feet in 1917, over 100,000 acre feet in 1927, and about 70,000 acre feet in 1930.

The total consumption of water, including water from the Los Angeles River basin, by the City of Los Angeles, ranged from 193,000 acre feet in 1919 to 273,000 acre feet in 1929, followed by a gradual decline to 222,000 acre feet in 1934, which increased to 234,000 acre feet in 1935, 260,000 acre feet in 1936, 257,000 acre feet in 1937, 251,000 acre feet in 1938, and 253,000 acre feet in 1939.

The first problem confronting us is a consideration of the claimed duty of defendants to conserve all of the water of the Owens River and not to permit any of it to waste. Counsel for plaintiff and the attorney general argue that as Los Angeles had appropriated 4000 second feet of water, much more than the total flow of the river, it was required by section 3 of article XIV of the Constitution to put its water to reasonable use and not to waste it. It is argued that as defendants had taken control of all of the waters of the Owens River flowing into the Tinnemaha Reservoir it was prohibited from wasting any of that water; that permitting it to flow into a saline lake was a waste of water as its usefulness was thereby destroyed.

In considering this problem two major questions arise: To what extent did the appropriation of more than the entire flow of the river vest ownership of the use of all of the water in defendants? Was possession and control taken of all the waters of the river flowing into Tinnemaha Reservoir which would require defendants to put it to beneficial use?

Section 1411 of the Civil Code provides as follows: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases."

The foregoing section was construed and applied in *Smith v. Hawkins*, 120 Cal. 86 [52 P. 139, 140], where the court said: "It is neither the capacity of the ditch nor the amount originally appropriated which determines plaintiffs' rights. If plaintiffs could forfeit their entire right of appropriation by nonuser, equally will they be held to forfeit less than the whole by like failure; in other words, the necessary result of the principles declared on that appeal is that, no matter how great in extent the original quantity may have been, an appropriator can hold, as against one subsequent in right, only the maximum quantity of water which he shall have devoted to a beneficial use at some time within the period by which his right would otherwise be barred for nonuser."

The rule is thus stated in *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82 [106 P. 404, 406, 29 L. R. A. N. S. 213]: "Therefore the only tenable ground upon which respondent can stand is that, with his appropriation for public use, he became a private appropriator of water for use upon his Buggytown ranch. If this be so, then his rights to water would be measured as are the rights of every other private appropriator . . . not by the amount which he took, not by the amount which he claimed, not, as the court decrees, by an amount sufficient thoroughly and properly to irrigate a thousand acres of land; but it would be measured by the amount which he had been actually taking and applying to a beneficial use upon that land. His right to priority in the use of water

would also be measured according to these facts and limited to this quantity."

In *Hufford v. Dye*, 162 Cal. 147 [121 P. 400, 403], it was held that where an appropriator failed to put all of the water appropriated to a beneficial use he lost the right to the surplus. The court stated the reason underlying this rule as follows:

> "It is the well-settled law of this state that one making an appropriation of the waters of a stream acquires no title to the waters but only a right to their beneficial use and only to the extent that they are employed for that purpose . . . He (plaintiff) is only entitled to what he needs and when he needs it, and has no right to complain of another appropriator taking it for beneficial purposes when he has no use for it. The use of water in this state is of such great necessity as to preclude its being allowed to run to waste, and its full beneficial and economical use requires that when the wants of one appropriator are supplied another may be permitted to use the flow for his benefit." (See, also, *Senior v. Anderson*, 115 Cal. 496 [47 P. 454]; *California, etc. Co. v. Madera, etc. Co.*, 167 Cal. 78 [138 P. 718]; *Simons v. Inyo Cerro Gordo Co.*, 48 Cal. App. 524 [192 P. 144]; *Akin v. Spencer*, 21 Cal. App. (2d) 325 [69 P. (2d) 430].)

It follows that the right to the use of waters from the streams of the state is limited to the amount of water actually put to beneficial use regardless of the amount of water that may be appropriated. As the appropriator has no right to the use of the water appropriated over the quantity put to beneficial use, and as the appropriator gains no ownership of the water itself by the appropriation but

only the right to its use, it follows that an appropriator acquires only rights in the quantity of water put to beneficial use and that he cannot be required to restrain and divert water in excess of that quantity; that the diversion of a greater quantity would be contrary to the spirit and intent of the water law of the state. He should not be required to waste the surplus onto the desert or into the sea.

Here we have a fast growing municipal corporation that acquired water rights far in excess of its present needs. It built an aqueduct to convey that water to its boundaries. This aqueduct had a capacity much beyond those present needs. The city was looking to the future and anticipating the future needs to be occasioned by its growth in population. Should we require it to take into its aqueduct system water to the full capacity of that system and beyond its present needs, or be responsible for any damages caused by the water which it did not need and could not use which flowed down the natural channel of the river from which diversions were made? If we should so hold we would establish a rule for which we can find no precedent and which would seriously handicap all growing municipalities in providing for future increases in population and consequent needs.

Any such rule, if established, would require such a municipality to acquire only such water as it could presently use and to build a conveyor system of a capacity exactly equalling those needs. When those needs increased it would be put to the necessity of acquiring additional water rights, if it could, and of going to the considerable added expense, over the cost of the original construction, in either enlarging or paralleling its conveyor system. Such a rule would be both improvident and economically unsound. A

city, like a person, should be permitted to anticipate future needs and build up a reserve for the proverbial rainy day. Of course its right to retain the use of a quantity of water beyond present needs and against subsequent beneficial use of the surplus by another may be questionable, but it certainly should be permitted to build a water transportation system of sufficient capacity to meet the needs of the future when that need arises without subjecting itself to a damage action such as we have here.

It has been held that as between a riparian owner and an appropriator the doctrine of beneficial use does not apply. (*Miller & Lux v. Madera Canal, etc. Co.*, 155 Cal. 59 [99 P. 502, 22 L. R. A., N. S. 391]; *Miller v Bay Cities Water Co.*, 157 Cal. 256 [107 P. 115, 27 L. R. A., N. S. 772]; *Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81 [252 P. 607]; *Gin S. Chow v. Santa Barbara*, 217 Cal. 673 [22 P. (2d) 5].) But we have here no such situation as presented in those cases. If plaintiff may be regarded as a riparian owner it is not asserting its right as such to have the waters of the Owens River flow to its property for use there, but it is seeking to compel the upstream appropriator to divert the water of the river from its original channel or to store those waters and to prevent them from reaching plaintiff's properties. This is the exact converse of the usual controversy between a lower riparian owner and an upstream appropriator and presents a situation most novel in the courts in this state. The question of the applicability of the doctrine of beneficial use here presents no great difficulties as plaintiff acquired its property and the cause of action arose after the adoption of section 3 of article XIV of the Constitution which establishes rules governing this situation.

Tinnemaha Dam was not built for the purpose of entirely checking the entire flow of the river and storing water behind it. It was rather to regulate the flow of the river and to level off the crests of the floods. The pipes through its base had a capacity of 800 second feet, the exact capacity of the aqueduct above Haiwee Reservoir, which was more than the usual flow of the river. Ordinarily the water flowed through the pipes in the base of the dam and down the river just as it would have done had there been no dam constructed.

This method of construction and operation does not indicate any intention to appropriate and use all of the water of the river. It rather evidences an intention to control its flow and thus put as much of that water to beneficial use as was necessary to supply the needs of the city.

As we have already seen, the appropriator gains no title to the water on which he files but only the right to its use and only to so much of it as he puts to a beneficial use. As held in the cases already cited, the size of his ditches or works do not determine the quantity of water he is entitled to use. It is determined by the quantity he puts to beneficial use. In this case that quantity is determined by the quantity of water taken into the aqueduct proper and used by the inhabitants of the city, or held in storage for their use, which is the extent of the right of defendants to the waters of the river, and not the quantity entering Tinnemaha Reservoir even though some of it may have been temporarily restrained there.

For these reasons the construction of Tinnemaha Reservoir did not establish any ownership of the use of all the waters entering it but only that portion put to beneficial use. Thus defendants were not required to store

all water flowing down the river nor were they required to find some beneficial use for all of it. They could permit the surplus above reasonable needs to follow the channel of the river to the destination provided by nature.

Section 3 of article XIV of the Constitution was adopted in 1928. It was first applied in the case of *Gin S. Chow v. Santa Barbara, supra.* It was carefully analyzed and applied in *Peabody v. City of Vallejo,* 2 Cal. (2d) 351 [40 P. (2d) 486, 491], where the Supreme Court said:

> "The limitations and prohibitions of the constitutional amendment now apply to every water right and every method of diversion. Epitomized, the amendment declares:
>
> "1. The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served.
>
> "2. Such right does not extend to the waste of water.
>
> "3. Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water.
>
> "4. Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.
>
> "The foregoing mandates are plain, they are positive, and admit of no exception. They apply to the use of all water, under whatever right the use may be enjoyed."

The doctrine of beneficial use has not been abolished by the constitutional amendment but rather it has been written into the fundamental law of the state with some restrictions on the prior definitions of the phrase. In the *Peabody* case [2 Cal. (2d) at page 368, 40 P. (2d) at page 492], it was said:

> "The right to the waste of water is not now included in the riparian right. As to what is waste water depends on the circumstances of each case and the time when waste is required to be prevented. In sections of the state, few in number, where the rivers and streams are plentifully supplied, and there is no need for the conservation of the product thereof, the water flows freely to the sea. When needed for beneficial uses it may be stored or restrained by appropriation subject to the rights of those who have a lawful priority in a reasonable beneficial use. That priority has been subjected to limitations and regulations prescribed by the Constitution, but it has by no means been abolished. Under the new policy the vested right theory, that is, the right of the riparian owner to all of the waters of the stream, as it is wont to flow in the state of nature, and without regard to the reasonableness of such use as against an appropriator, has been subjected to such limitations that the old doctrine declared in Miller & Lux v. Madera Canal & Irr. Co., 155 Cal. 59 [99 P. 502, 22 L. R. A., N. S. 391], is no longer the law of this State. Also distinctions heretofore made between the unusual or extraordinary and the usual or ordinary flood and freshet waters of a stream are no longer applicable."

Plaintiff argues that under this constitutional provision defendants are required to restrain all of the waters of the river which they had appropriated, to the capacity of their system; that to permit any of those waters to flow down the original river channel and become saline in Owens Lake was a waste of water that is prohibited by the Constitution.

It is true that the river water reaching Owens Lake is wasted in so far as its use for domestic purposes and irrigation are concerned. But Owens Lake was the repository provided by nature for that water. Had there been no use by diversion of the river water all of the flow would have reached the lake and become saline. Can it be said that permitting water to flow down its natural river channel and reach its ultimate destination provided by nature is "the waste or unreasonable use or unreasonable method of use" prohibited by the Constitution? "Waste" and "unreasonable use" and "unreasonable method of use" are all linked together in the section. Certainly "unreasonable use" and "unreasonable method of use" must refer to the use of water by humans. If that is true the "waste" of water should be held to refer to its waste by humans and not in permitting water to flow in its natural channel to the terminus provided by nature. If this be not true then it is waste to permit the rivers of the state to empty their waters into the sea. We cannot differentiate between the "waste" of water in a saline lake and the "waste" of water into the salty sea. In both cases the water becomes unfit for human consumption and use in irrigation.

We cannot import to the people of the state, in adopting this section, any intention to prohibit the waters of the Sacramento and San Joaquin Rivers from reaching the sea during the periods of high water which occur almost

every year and often reach serious flood proportions. Irrigation stops and domestic use lessens during periods of heavy rainfall. During such times riparian waters and waters appropriated by others mingle with the other waters of the rivers and streams, including flood and vagrant. The combined waters often produce damaging floods that as yet have not been controlled. To require the owners of these rights to use such waters, or portions of them, to impound them in reservoirs or to develop beneficial uses for them, would place an intolerable if not an impossible burden upon them that would thwart the very purpose of the amendment which clearly is to conserve the water resources of the state, prohibit their monopolization by claimants who have no beneficial use for them, permit the orderly development of the arid regions and provide for needs of a growing population. This is done by declaring the title to all waters to be in the state and permitting private ownership of the right to their use to those persons, corporations and public bodies who can provide a beneficial use for portions of them. The waste referred to in the section cannot refer to the waste of those waters into saline lakes or the sea through the channels provided by nature, but the waste through artificial means built by riparian owners or appropriators.

Twice it has been held that permitting the discharge of the waters of rivers through natural channels into saline lakes which were their natural termini was not the waste of waters prohibited in section 3 of Article XIV of the Constitution (*City of Los Angeles v. Aitken*, 10 Cal. App. (2d) 460 [52 P. (2d) 585]; *City of Elsinore v. Temescal Water Co.*, 36 Cal. App. (2d) 116 [97 P. (2d) 274].)

Plaintiff argues that as the aqueduct was constructed so as to be permanent in character and so as to convey, and having conveyed, the major portions of the waters of Owens River for a great many years, it has become the channel of the river through which defendants must permit its waters to flow; that plaintiff, having acquired and improved its properties while relying on the existence of this channel and its continued operation as the channel carrying the major flow of the river, was entitled to demand its continued use as such and was entitled to recover damages caused by the failure of defendants to so use it.

Counsel argue at considerable length the question of whether the aqueduct possessed any of the characteristics of a river channel and whether an aqueduct built by a municipality for the sole purpose of supplying the needs of its inhabitants could be regarded as the channel of a river. While the arguments of defendants on this question contain much logic we need not lengthen this opinion by considering the question.

The leading case in California on the question of an artificial channel becoming a river channel is *Chowchilla Farms, Inc., v. Martin*, 219 Cal. 1 [25 P. (2d) 435, 441]. There the Supreme Court carefully considered numerous authorities from this and other jurisdictions bearing on the question so it is unnecessary for us to review them and others cited by counsel.

After reviewing numerous cases the Supreme Court said:

> "We find that text-writers whose works have been accepted as authority upon the subject of water rights are in accord with the authorities above cited . . .

"In *Wiel on Water Rights*, volume 1, section 60, that author states the law as follows: 'There is further an established principle that by lapse of time an artificial watercourse may come to be regarded as equivalent to a natural one. These cases do not depend exactly upon prescription, for, as above shown, prescription, properly speaking, cannot run in favor of lower parties upon a flow as against parties higher up. They rest rather upon what some of the cases call ordinary dedication to a class of public which, in the course of time, has established itself upon the basis of the artificial condition. Where the creator of the artificial condition intended it to be *permanent*, and a community of landowners or water users has been allowed to adjust itself to the presence and existence of the artificial watercourse or other artificial condition, acting upon the supposition of its continuance, and this has proceeded for a long time beyond the prescriptive period, the new condition will be regarded as though it were a natural one, its artificial origin being then disregarded by the law as it has been by the community. The creator of the artificial watercourse will be held to have dedicated it to the use of the community that has by long time become adjusted to it.' . . . In line with the foregoing we cite the following authorities: *Hornor v. City of Baxter Springs*, 116 Kan. 288 [226 Pac. 779]; *Ellis v. Tone*, 58 Cal. 289; *Paige v. Rocky Ford Canal, etc. Co.*, 83 Cal. 84 [21 Pac. 1102, 23 Pac. 875]; *Harrington v. Demaris*, 46 Or. 111 [77 Pac. 603, 82 Pac. 14, 1 L. R. A. (N. S.) 756]; *Smith v. Youmans*, 96 Wis. 103 [70 N. W. 1115, 65 Am. St. Rep. 30, 37 L. R. A. 285]; *Delaney v. Boston*, 2 Harr. (Del.), 489; *Shepardson v. Perkins*, 58 N. H. 354; *Woodbury v. Short*, 17 Vt. 387 [44 Am. Dec. 344]; *Rait v. Furrow*, 74 Kan. 101 [85

Pac. 934, 10 Ann. Cas. 1044, 6 L. R. A. (N. S.) 157]; *City of Reading v. Althouse*, 93 Pa. St. 400."

The authorities are not in accord as to the exact principle upon which rests the right to regard the artificial channel as the channel of a stream. Some base it on long acquiescence in the new condition, others on reciprocal rights based on uses for periods beyond the statute of limitations, and still others on something akin to equitable estoppel as well as on other grounds. As was said in *Hammond v. Antwerp Light & Power Co.* [132 Misc. 786], 230 N. Y. S. 621: "The principle is the same, whether it be called reciprocal rights, equitable estoppel, or any other name." Regardless of the name that may be given to the right, there runs through all the cases the reasoning that there must be long acquiescence in the new condition by all parties affected before the artificial channel will be regarded as the channel of the river. This seems to be a universal requirement of the courts and it furnishes a convenient gauge with which to measure the rights of the parties here.

It is clear that before there can be acquiescence in the conditions there must be knowledge of those conditions, for acquiescence imports tacit consent, concurrence, acceptance or assent. There can be none of these without knowledge. Further, the acquiescence must be in those conditions that exist during the period in which it is claimed to have occurred. A person cannot be said to acquiesce in a condition that did not exist nor in a situation that arose after the period of acquiescence had passed and the action based on acquiescence had been filed. With these observations in mind we must proceed to consider the conditions in which it might be said the parties ac-

quiesced and thereby measure the right (if such right existed) of plaintiff to demand that defendants "take into their aqueduct system, all of the flow of Owens River which they could take up to the reasonable capacity of said aqueduct system and its appurtenant facilities, reasonably constructed and reasonably operated" as found by the trial judge as the foundation for the judgment.

Tinnemaha Reservoir was neither constructed nor operated as a storage reservoir but rather to level out the flow of the river. Intake was equipped with gates so that varying quantities of the river water could be admitted into the aqueduct or all of it excluded and turned down the river. Any excess water over that taken into the aqueduct had no other course to follow than down the natural river channel into Owens Lake. Except in isolated years of extreme drought all the river water was not taken into the aqueduct at Intake and some of it found its way down the natural channel into Owens Lake. Plaintiff admits this latter fact. A report submitted to plaintiff's representative before the purchase contained the following:

> "The general situation in respect to resources on the lake is somewhat as follows: The meander line, being essentially the original shore line of the lake was surveyed first in 1859. This lake was the dead end where the discharge of the Owens River was impounded without outlet. A condition of stability continued until during 1915, the waters of the Owens River were diverted for purposes of the Los Angeles (city) water supply. The shore line continually receded from 1915 until in 1920 the present condition of stability established itself. Underground streams, shore wells and remaining portions of the

> Owens River discharge continue to flow into the remaining lake area so that at present the incoming fresh water is balanced by the combination of natural evaporation and brine withdrawal by the industries."

Thus plaintiff had actual notice that waters from Owens River flowed into Owens Lake through the natural channel before it purchased its properties in 1932.

The structural construction of the aqueduct above Haiwee Reservoir was such as to give notice to anyone who chose to inquire that the entire flow of the river might be excluded from the aqueduct at Intake and permitted to flow down the natural channel to Owens Lake; that the entire flow of the aqueduct might be turned out of it before the water reached Haiwee Reservoir, into the natural channel of Owens River and find its way into Owens Lake.

Plaintiff maintains that it had no actual knowledge of these various structures. Still it relies on acquiescence. How can there be acquiescence without knowledge? Its plea of ignorance defeats its plea of acquiescence.

Before its purchase in 1932 and again before it spent large sums of money in enlarging and improving its works shortly before 1937, plaintiff made no serious effort to ascertain the flow of Owens River in preceding years, nor the amount of that flow taken by defendants for municipal use. Its inquiries along those lines were most casual. Information sought by its representatives was furnished by officers of the City of Los Angeles but plaintiff did not seek to learn the flow of the Owens River during various years nor the amount of water taken into the aqueduct at

Intake nor the consequent discharge of water down the natural channel into the lake.

Had they investigated they could have learned the flow of Owens River at Charlies Butte in 1927, a year of fairly generous precipitation. They could have learned that this flow materially exceeded the water taken into the aqueduct at Intake and that consequently there was a considerable discharge into Owens Lake. The following figures give the river flow in second feet. The first figure following each month is the maximum, the second the minimum, and the third the mean flow for that month: January—390, 335, 369; February—696, 334, 456; March—540, 367, 424; April—517, 118, 228; May—250, 88, 152; June—686, 171, 467; July—634, 394, 498; August—442, 105, 182; September—282, 84, 161; October—358, 264, 325; November—516, 360, 412; December—414, 369, 385. In that year approximately 101,000 acre feet of water reached Owens Lake. The river flow in the years 1937 and 1938 materially exceeded the flow of 1927. About 62,000 acre feet reached Owens Lake in 1937 and about 251,000 acre feet in 1938 which was a year of heavy precipitation. Here again acquiescence cannot be predicated on ignorance.

Had plaintiff had knowledge of all necessary facts, the structural construction of the aqueduct and the conduct of the parties would have disclosed the following upon which acquiescence must be predicated: That only in a year, or a very few years, of extreme drought did defendants divert all of the flow of Owens River into the aqueduct at Intake; that in years of water deficiency they diverted a considerable portion of that flow, but that water ran down the natural river channel into Owens

Lake; that during years of average or excess precipitation it diverted a smaller percentage of the river flow and considerable quantities of water followed the natural channel into Owens Lake; that the gates at Intake might be closed thus sending all of the flow of the river down the natural channel into the lake; that the discharge gates on the aqueduct above Haiwee Reservoir might be opened thus turning all the water into the natural channel and through it into Owens Lake.

These facts, if acquiesced in, fail to establish that the aqueduct is a new channel for Owens River. Nor do they establish the abandonment of the natural channel of the river. They contain no representation to the effect that defendants would divert into its aqueduct at Intake water to the reasonable capacity of the aqueduct system reasonably operated as found by the trial court. Acquiesence in these conditions cannot support the theory on which the judgment is based.

As the natural channel of Owens River had not been abandoned by the substitution of the aqueduct, as its channel, defendants breached no duty they owed to plaintiff by permitting waters of the Owens River to flow down that natural channel and reach the resting place provided by nature in Owens Lake. It follows that plaintiff can neither enjoin defendants from permitting the waters of the Owens River (not taken into the aqueduct at Intake) from flowing down that natural channel nor can they recover for damages caused by those waters after they reached the terminus provided by nature.

The trial court found that the aqueduct was negligently constructed, and negligently operated in 1937 and 1938,

which negligent construction and negligent operation were the proximate cause of the damages suffered by plaintiff.

The negligence charged to defendants consists principally of the following classes of acts or omissions: The negligence of construction was the failure to build a water storage reservoir of large capacity above the Tinnemaha Reservoir. The negligent operation was the failure to use spreading facilities already constructed, failure to fill the aqueduct and reservoirs to capacity and waste water on the desert below Haiwee Reservoir or elsewhere, and turning water taken into the aqueduct at Intake out of it through the gates above Haiwee Reservoir so that it would again reach the natural river channel and flow through it into Owens Lake.

Plaintiff asserts that before the purchase of its properties in 1932, defendants made provision for the construction of a large storage reservoir near Long Valley in Inyo County; that this construction had been started, probably as early as 1930, and was abandoned. Defendants say that construction was abandoned because the natural formation under the dam where work was started proved unsuitable for its foundation. The dam at Long Valley was started at a much later date and was completed in 1940, with a storage capacity of 183,000 acre feet. Engineers testified for plaintiff that the failure to construct this storage reservoir at a much earlier date constituted negligence and faulty construction and was poor engineering practice.

All this may be true but we cannot see how the failure to construct this dam before the high water of 1937 can aid plaintiff. As we have already seen, defendants were not required to store or take water in excess of the quan-

tity which could be put to beneficial use. After about 1925, the flow of the river exceeded the water taken into the City of Los Angeles. The water reaching Los Angeles, plus the water from the Los Angeles River, had been sufficient to supply the municipal demands so there had been no water shortage there. There was no duty imposed on defendants to take or store water in excess of its reasonable demands. It was not required to take or store water beyond its needs merely to protect lower owners or operators from the results of that water flowing down its natural channel and emptying into the terminus provided by nature. Had the aqueduct system not been completed and in operation in 1937 and 1938, the river flow actually reaching Owens Lake would have been augmented by the quantities of water taken by defendants which reached Los Angeles. Thus instead of increasing the flow of the river into Owens Lake in those two years, that flow was reduced by the water taken by defendants.

Further, the case of plaintiff rests on the acquiescence of the parties in existing conditions created by the aqueduct and its works. How there can be any acquiescence in a condition, or reliance on the effect of a structure that did not exist, we fail to understand.

Defendants had constructed drains below Tinnemaha Reservoir to conduct any seepage from it back into the natural river channel, and below Haiwee Reservoir to conduct any seepage back into the aqueduct. These seepages originally were part of the natural flow of the river and, as we have seen, defendants owed no duty to plaintiff to restrain the river flow and to keep it from proceeding down the natural channel to Owens Lake. We are pointed to no evidence of any serious seepage from the aqueduct proper.

Defendants had constructed spreading works to retard the flow of surface waters and stream waters so that some of them would be absorbed into the ground, ultimately reaching underground gravels, to be pumped out during seasons of water shortage. The spreading works were not used in 1937 and 1938. The trial court found that the failure to use them was negligent operation of the aqueduct system. Defendants urge that during much of the time the spreading works were not operated the ground was frozen and would not absorb water so that an attempt to operate them would have been useless. Be that as it may, we cannot see how the failure to operate these spreading works can affect this case. A lower owner cannot complain because surface waters reach his property. (*Mogle v. Moore*, 16 Cal. [2d] 1, [104 P. (2d) 785].) In the course of nature these surface waters and stream waters had found their way into Owens River and had flowed down its channel to Owens Lake. Certainly the spreading works, whether operated or not, did not increase the natural river flow. As defendants owed plaintiff no duty to restrain the flow of surface waters nor to control or restrain the flow of streams or rivers in their natural channels we can find no negligence for which defendants can be liable in the failure to restrain the flow of water which had Owens Lake as its natural terminus.

We need spend little time on the failure of defendants to fill the aqueduct to its capacity during the period in question or to waste water onto the desert so as to reduce the flow into Owens Lake. There are constitutional provisions preventing defendants from taking water beyond its needs, and there is the lack of duty on defendants to divert unnecessary water from the natural

channel of the river. This we have already emphasized. As a matter of fact defendants did waste water onto the desert and down the Santa Clara River in an effort to reduce the flow of Owens River into Owens Lake.

The evidence shows that for short periods the gates in the aqueduct above Haiwee Reservoir were opened so that the flow of the aqueduct was diverted into Owens River and found its way into Owens Lake. Defendants maintain that the diversion of this water was done because the aqueduct had iced over and to prevent ice jams and the entry of debris and injurious foreign substances into the system. The trial court found against defendants on all these subjects except the aqueduct being iced over. We are pointed to no finding on that subject.

The question of the liability of defendants for damages caused by water once taken into the aqueduct proper and then turned out of the system, as found, might present an interesting question for study were we required to decide it. The damages estimated and found, were based on the total amount of water reaching Owens Lake, part reaching the lake through the length of the natural channel and part through the lower portion of that channel after having been discharged from the aqueduct through the gates above Haiwee Reservoir. There was no effort to segregate the damage caused by waters from these separate sources. It would seem probable that much less water was turned out of the aqueduct through these gates than flowed down the length of the channel. If there is any liability on defendants for damages caused by the water turned out through the gates some effort should be made to determine the damages, if any, caused by that water before we should be required to determine the entire ques-

tion. We are not required to determine whether the right of the plaintiff, if any, to have the water entering the aqueduct retained in it must yield to the public welfare of the more than a million inhabitants of the City of Los Angeles. We expressly refrain from deciding the question of the liability of defendants, if any, for damages caused by water turned out of the aqueduct after it had entered it at Intake.

Nothing in this opinion should be construed as a holding that a municipality may not store water for future municipal use beyond the quantity immediately necessary for present use.

It is not necessary to consider the other questions raised by defendants.

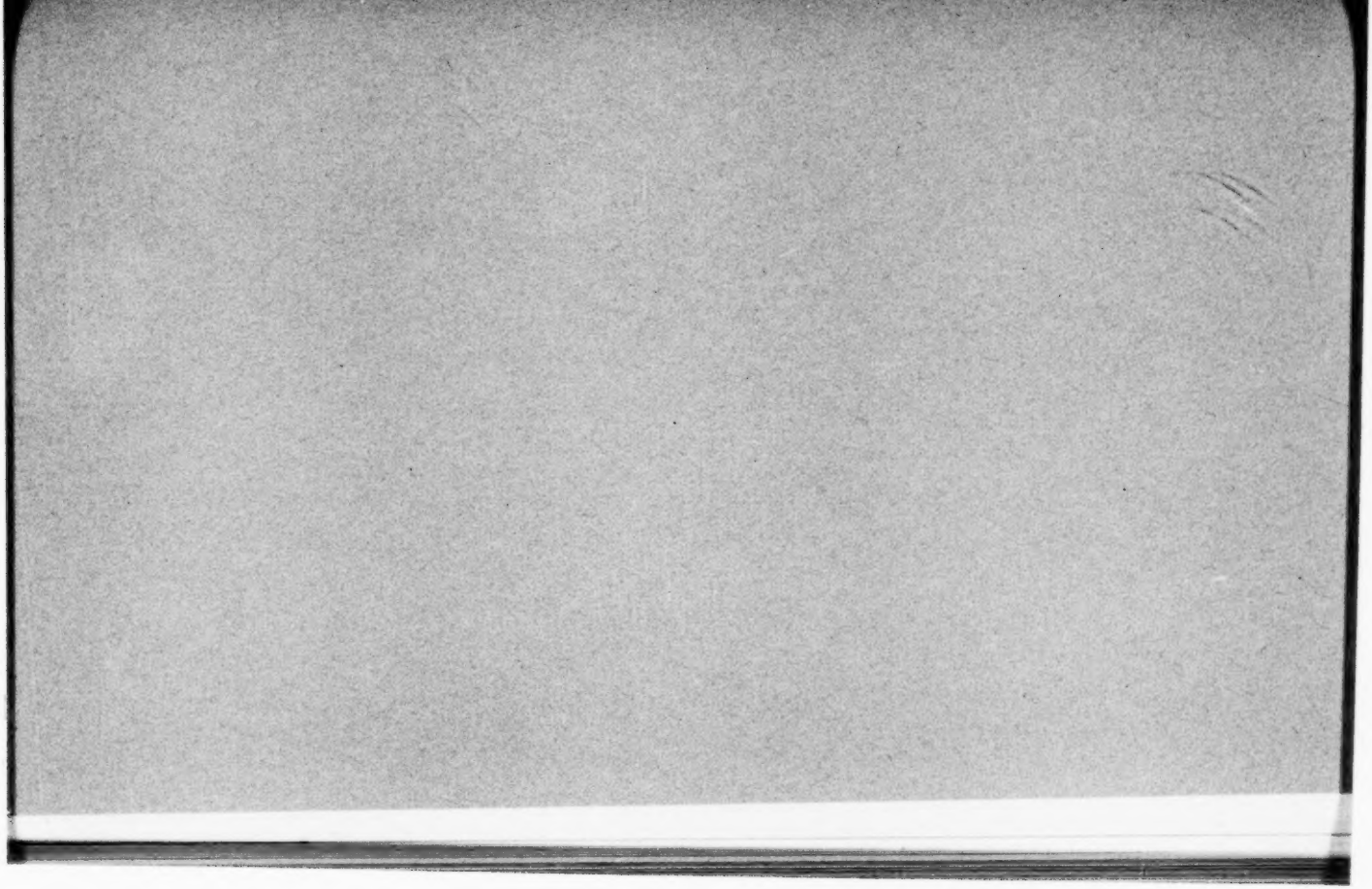
The judgment is reversed.

MARKS, *J.*

We concur:

BARNARD, *P. J.*

GRIFFIN, *J.*



APPENDIX C.

Constitution of the United States, Section 1 of Article XIV of the Amendments thereto:

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Judicial Code of the United States, Section 237, as amended (United States Code Annotated, Title 28, Section 344):

> "§344. (Judicial Code, section 237, amended.) Appellate jurisdiction of decrees of State courts; certiorari. * * *.
>
> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, * * * of * * * the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on

a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Constitution of California, Article I, Section 13:

"§13. *Personal and property rights.* * * No person shall * * * be deprived of life, liberty, or property without due process of law. * * *."

Constitution of California, Article XIV, Section 3:

"§3. *Conservation of water.* It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or watercourse attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream

to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the legislature may also enact laws in the furtherance of the policy in this section contained. [New section added by amendment adopted November 6, 1928.]"

Civil Code of California, Sections 1410, 1411, 1415 and 1416:

"§1410. [*How rights to water may be acquired.*] All water or the use of water within the state of California is the property of the people of the state of California, but the right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation in the manner provided by law; * * * [Enacted 1872; Am. Stats. 1911, p. 821.]"

"§1411. *Appropriation must be for a useful purpose.* The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases. [Enacted 1872.]"

"§1415. [*Notice of appropriation.*] A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein:

1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure;

2. The purposes for which he claims it, and the place of intended use;

3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it. * * *. [Enacted 1872; Am. Stats. 1903, p. 361.]"

"§1416. [*Work to be done in appropriation of waters.*] Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, or the survey, road or trail building, necessarily incident thereto, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snows or rain; * * *

Provided, that whenever any city and county, or any incorporated city or town within this state makes, or has made, or acquires, or has acquired any appropriation of any of the waters of this state in accordance with the provisions of section 1415 of this code, it shall not be necessary for such city and county, city or town to commence the work for development of more of the water so claimed than is actually necessary for the immediate needs of such city and county, city or town, and it shall be held to be a sufficient compliance with the requirements of this chapter, to the full amount of water stated in the notice posted and recorded, for such city and county, city or town to within sixty days make the necessary surveys, or within six months to authorize the issuance of municipal bonds, for the construction of the necessary works designed to supply such city and county, city or town with the water required for immediate use. * * * [Enacted 1872; Am. Stats. 1895, p. 70; Stats. 1903, p. 396; Stats. 1907, p. 780; Stats. 1911, p. 1419.]"

Water Commission Act of California, Sections 20 and 20a [Cal. Stats. 1917, Chapter 554, pp. 746-748]:

"Sec. 20. All permits and licenses for the appropriation of water shall be under the terms and conditions of this act, and shall be effective for such time as the water actually appropriated under such permits and licenses shall actually be used for the useful and beneficial purpose for which said water was appropriated, but no longer; and every such permit or license shall include the enumeration of conditions therein which in substance shall include all of the provisions of this section and likewise the statement that any appropriator of water, to whom said permit or license may be issued, shall take the same subject to such conditions as therein expressed; * * * If it shall appear to the state water commission at any time after a permit or license is issued as in this act provided that the permittee, or licensee, * * * has not put the water granted under said permit or license to the useful or beneficial purpose for which the permit or license was granted, or that the permittee or licensee, has ceased to put said water to such useful or beneficial purpose, * * * then and in that case the said commission, * * * may revoke said permit or license and declare the water to be unappropriated and open to further appropriation in accordance with the terms of this act. * * *"

"Sec. 20*a*. When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water."

(25)

FILED
MAR 3 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 723

CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

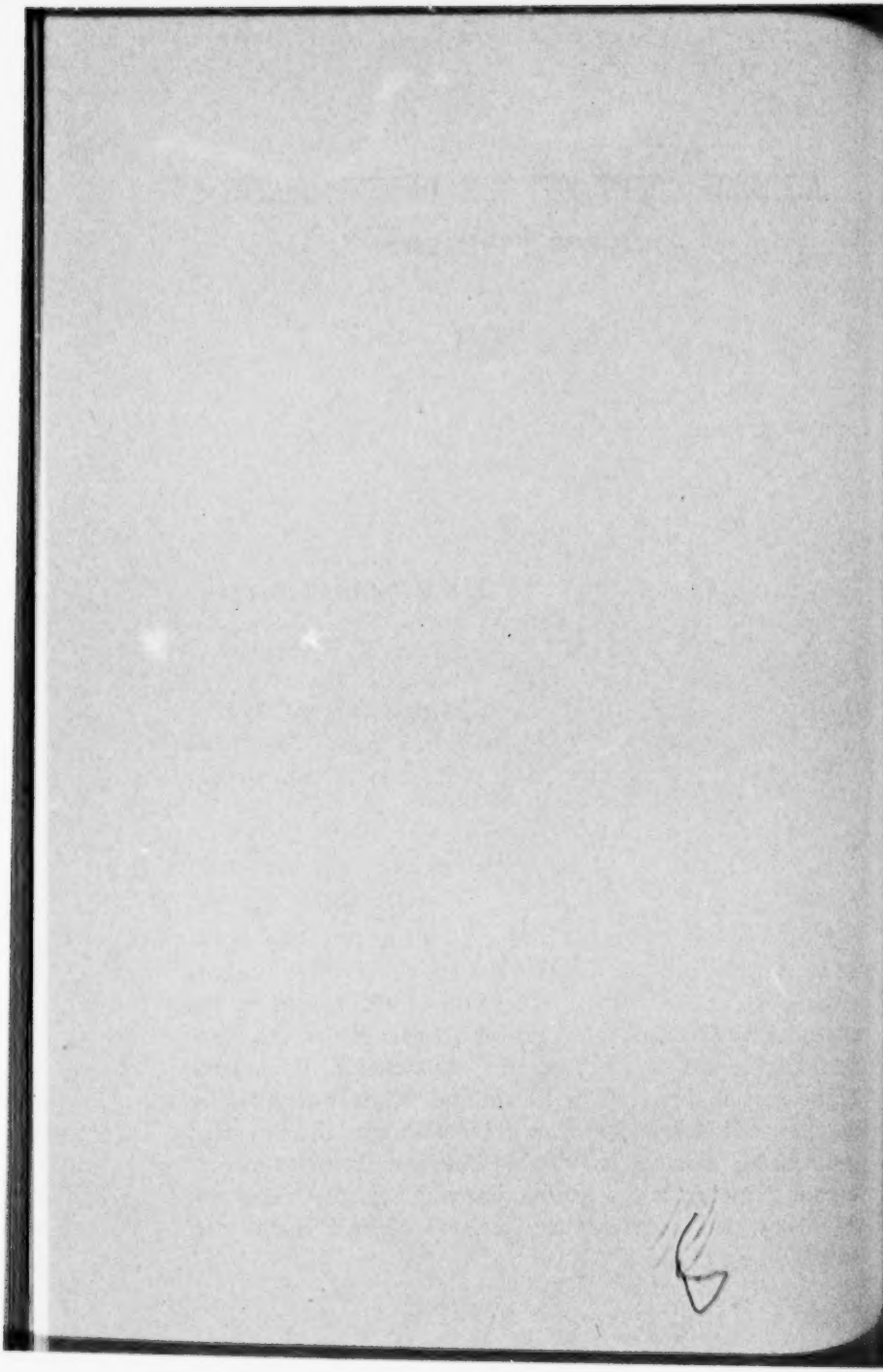
vs.

NATURAL SODA PRODUCTS COMPANY, A CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

MOTION FOR LEAVE TO PROCEED ON TYPEWRITTEN RECORD.

RAY L. CHESEBRO,
City Attorney
S. B. ROBINSON,
Chief Assistant City Attorney for Water and Power
SAMUEL POORMAN, JR.,
Assistant City Attorney
A. E. CHANDLER,
Special Counsel,
Counsel for Petitioners.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 723

CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, *Petitioners,*

vs.

NATURAL SODA PRODUCTS COMPANY, A CORPORATION.

Respondent.

MOTION FOR LEAVE TO PROCEED WITH PETITION FOR WRITS OF CERTIORARI ON TYPEWRITTEN TRANSCRIPT OF RECORD AND ORIGINAL EXHIBITS ON FILE.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners above named, having filed in the office of the Clerk of this Honorable Court the entire record on appeal to the Supreme Court of the State of California in the above-entitled consolidated causes (consisting of the typewritten Clerk's Transcript, the typewritten Reporter's Transcript, and the original Exhibits), all duly certified by the Clerk of the court last named, together with their printed petition for issuance out of this Court of its writs of certiorari, directed to the said Supreme Court of California, to review the judgment and decision of said last-named court in said causes;

Come now said petitioners and move that this Court may make its order granting to said petitioners leave to proceed with said petition for said writs of certiorari upon their said petition, brief and appendices and upon said typewritten transcripts and said original exhibits without awaiting the printing of said record conformably to the rules of this Honorable Court.

This application for leave to proceed as aforesaid is made upon the following grounds, to wit:

(1) That the said typewritten transcript consist of approximately 5,000 pages comprising 9,732 folios.

(2) That said original exhibits are 152 in number, 77 thereof being the exhibits of respondent (plaintiff below), and 75 thereof being the exhibits of petitioners (defendants below). That many of said exhibits consist of numerous pages of statistical data, one of the most important thereof containing 138 pages of figures. Other of said exhibits are photographs, maps, and plans that will have to be reproduced in facsimile, or reduced facsimile, by the photographic and photostatic processes.

(3) That petitioners are advised by the Clerk of this Court that it will take at least one month to print the said record herein, and that the cost of such printing will be in the neighborhood of $10,000.

(4) That, for the presentation of the points upon which petitioners rely in their said petition for the issuance of said writs of certiorari, said record need have included no more than one-seventh, and probably less, of said Reporter's Transcript (which comprises by far the larger part of said 9,732 folios), while said Clerk's Transcript can likewise be greatly curtailed, though in a less degree than said Reporter's Transcript.

(5) That if said petition for said writs of certiorari be granted, suitable arrangements for the printing of said

record (or of so much thereof as it may be necessary to print), can be made at that time, and petitioners hereby undertake to make such arrangements accordingly.

(6) That commencing on December 13, 1943, petitioners called to the attention of counsel for respondent the rule of this Court requiring that such records be curtailed and apparently favoring an agreed statement where practicable. This was done by letter wherein petitioners indicated in general terms the portions of said record to be omitted. Under date of December 17, 1943, counsel for respondent replied thereto by letter as follows: "We are, of course, perfectly willing to omit immaterial matter, but, manifestly, we are in no position to make any specific agreement in this regard until we are fully advised as to the position you intend taking. If you would care to forward us a copy of your petition this might afford us a better basis for discussion and consideration of your specific request."

(7) On December 23, 1943, petitioners again addressed a letter to counsel for respondent, advising them that petitioners had listed the passages in the record below that they desired to have included in the record on certiorari, for the purpose of the praecipe that they purposed filing with the Clerk of the Supreme Court of California, and they therein suggested that they would furnish such list to counsel for respondent and that thereupon counsel should advise petitioners what additional portions of the record respondent might desire to have certified to this court, in order that the necessary copying could include in proper order all portions required by both parties. That in reply thereto counsel for respondent advised petitioners, by letter dated December 28, 1943, that, unless furnished in advance with a copy of said petition for said writs of certiorari, they would have to insist upon the entire record being certified to this Court.

(8) That on December 27, 1943, Samuel Poorman, Jr., one of counsel for petitioners, completed a draft of said petition and submitted the same to the other counsel for petitioners. That he proceeded at once with the writing of said supporting brief, but his work thereon was interrupted for practically the entire month of January, 1944 when he was otherwise engaged in Washington, D. C., and in Salt Lake City, Utah. That on February 9, 1944, a copy of petitioners' brief, in typewritten form but in substantial identity with said brief as filed herein, was forwarded to counsel for respondent at San Francisco, California. That on February 11, 1944, a copy of said petition, in typewritten form but in substantial identity with said petition as filed herein, was also forwarded to counsel for respondent, at San Francisco, California.

(9) That on February 25, 1944, petitioners served upon counsel for respondent a proposal for the omission by stipulation, from the record to be printed herein, of by far the greater part of said Reporter's Transcript, and on February 26, 1944, likewise served upon counsel for respondent a proposal for the like omission by stipulation of considerable portions of said Clerk's Transcript and most of said exhibits.

(10) That on February 28, 1944, counsel for respondent notified petitioners by letter that they would require that "the whole of the Reporter's Transcript and the Clerk's Transcript on appeal in the State Court should be printed" and also that if "the original exhibits [had been] forwarded pursuant to rule 10, subdivision 4 * * * we shall naturally be willing to agree to the use of such original exhibits to the extent that such may be proper."

(11) That thereafter on said February 28, 1944, petitioners telegraphed the Clerk of this Court advising him of respondent's refusal to abridge the record to be printed

(except as indicated above in respect of the original exhibits), and requesting the immediate printing of both the Clerk's Transcript and the Reporter's Transcript, and, if necessary, of said exhibits, and likewise requesting said Clerk to obtain the order of this Court for a sufficient enlargement of time to permit of such printing and of the service of said record on respondent thereafter.

Wherefore, petitioners pray that this their motion for leave to proceed with their said petition for said writs of certiorari upon said typewritten transcripts of the record and upon said original exhibits, all as filed herein, be granted, upon condition, however, that in the event said writs of certiorari be issued, suitable arrangements in respect of the printing of the record be thereupon made by petitioners.

Dated at Los Angeles, California, this 29th day of February, 1944.

CITY OF LOS ANGELES,
A Municipal Corporation, and
DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,
A Department Created under the Charter of Said City,
Petitioners,
By RAY L. CHESEBRO,
City Attorney;
S. B. ROBINSON,
Chief Assistant City Attorney for Water and Power;
SAMUEL POORMAN, JR.,
Assistant City Attorney;
A. E. CHANDLER,
Special Counsel;
By SAMUEL POORMAN, JR.,
Counsel for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 723

CITY OF LOS ANGELES (a municipal corporation), DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,
Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY (a corporation).

CITY OF LOS ANGELES (a municipal corporation), DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,
Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY (a corporation).

STATEMENT OF RESPONDENT IN OPPOSITION TO MOTION FOR LEAVE TO PROCEED WITH PETITION FOR WRITS OF CERTIORARI ON TYPEWRITTEN TRANSCRIPT OF RECORD AND ORIGINAL EXHIBITS ON FILE.

KENNETH FERGUSON,
FRANCIS R. KIRKHAM,
JESS G. SUTLIFF,
Counsel for Respondent.

In the Supreme Court
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vs.

NATURAL SODA PRODUCTS COMPANY (a corporation).

STATEMENT OF RESPONDENT IN OPPOSITION TO MOTION FOR LEAVE TO PROCEED WITH PETITION FOR WRITS OF CERTIORARI ON TYPEWRITTEN TRANSCRIPT OF RECORD AND ORIGINAL EXHIBITS ON FILE.

In this case no federal question was raised in the state trial court; no federal question was raised in the Statement of Questions Involved on Appeal filed by petitioners in the courts below;[1] aside from one or two passing references, clearly insufficient to found the jurisdiction of this Court,[2] no federal question was even mentioned in the briefs filed in the state appellate courts. No federal question is raised in the record; no such question was presented to or decided by the Supreme Court of California,[3] by the District Court of Appeal,[4] or by the trial court.

We believe it clear that this Court is without jurisdiction in this case for want of a properly presented federal question.

Further, even if a federal question had been timely raised, the decision sought to be reviewed would rest upon adequate nonfederal grounds of decision. So much is clear from the petition itself. And still further, no substantial

---

[1]Rule VIII, Rules of the Supreme Court and District Courts of Appeal of the State of California, effective at the time of petitioners' appeal below, so far as pertinent, provided:

> "Sec. 2. A statement of the question involved on an appeal in a civil action shall be set forth on the first page of the appellant's opening brief, and without any other matter appearing thereon."

[2]For example, even the tardy statement in the petition for a rehearing filed by petitioners in the Supreme Court of California and referred to at page 3 of the petition for writs of certiorari, is as follows:

> "To require defendants so to do for the benefit of plaintiff, would be a confiscation of defendants' property in violation of the constitutional guaranties against the taking of property without compensation or without due process of law."

[3]The opinion of the California Supreme Court is reported at 23 A.C. 190, 143 P.(2d) 12.

[4]The opinion of the District Court of Appeal is reported at 56 A.C.A. 108, 132 P.(2d) 553.

federal question—indeed, no federal question at all—is urged in the petition for writs of certiorari.

Notwithstanding the foregoing, petitioners have filed a petition for certiorari which requires respondent to oppose the motion to proceed upon the unprinted record. The petition seeks a general review of all questions involved in the case. In this situation, it clearly is essential that the entire record, as it was considered by the court below, be before this Court. No valid reason for dispensing with the printing of the typewritten transcript is presented by the motion. Additionally, no reason appears why petitioners failed to print the motion now under consideration, as required by Rule 7, paragraph 1, of the Rules of this Court.

The one hundred fifty-two exhibits referred to in paragraph (2) on page 2 of petitioners' motion are original exhibits which were certified to the Supreme Court of California from the trial court and which, we understand, have been certified to this Court. Respondent does not oppose the motion in so far as it seeks to dispense with the printing of these exhibits.

We should point out that petitioners' motion states (paragraph (11), page 6) that the Clerk of this Court already has been advised to proceed immediately with the printing of the record. We are uncertain, therefore, exactly what relief petitioners seek. The procedure in this

case is further confused by the fact that petitioners have served upon respondent a notice of the filing of the petition for writs of certiorari and a printed copy of the petition, but no printed copy of the record. (Compare Rule 38, paragraph 3, of the Rules of this Court.) If (or in so far as) petitioners' motion is treated as one for an extension of time within which to serve a printed copy of the record upon respondent (i.e., until after the Clerk of this Court shall have had an opportunity to print the record), respondent does not oppose the motion.

Dated, San Francisco, California,
March 3, 1944.

Respectfully submitted,

KENNETH FERGUSON,
FRANCIS R. KIRKHAM,
JESS G. SUTLIFF,
Counsel for Respondent.

(27)

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IN THE

Supreme Court of the United States

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NATURAL SODA PRODUCTS COMPANY, a corporation,
Respondent.

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,
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vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,
Respondent.

Petitioners' Reply to Respondent's Statement in Opposition to Motion for Leave to Proceed With Petition for Writs of Certiorari on Typewritten Transcript of Record and Original Exhibits on File.

RAY L. CHESEBRO,
City Attorney;
S. B. ROBINSON,
Chief Assistant City Attorney for Water and Power;
SAMUEL POORMAN, JR.,
Assistant City Attorney;
A. E. CHANDLER,
Special Counsel;
207 South Broadway, Los Angeles,
Counsel for Petitioners.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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Petitioners' Reply to Respondent's Statement in Opposition to Motion for Leave to Proceed With Petition for Writs of Certiorari on Typewritten Transcript of Record and Original Exhibits on File.

Respondent's Statement (a) Is Not Founded on Fact, and (b) if True, Would Be No Answer to Petitioners' Motion to Proceed.

Respondent opposes petitioners' motion to proceed herein without awaiting the printing of the certified transcript

upon the ground that no federal question was raised in the State courts or even mentioned "aside from one or two passing references clearly insufficient to found the jurisdiction of this court." [Statement, p. 2.]

On the contrary, the federal question was raised and reiterated as will be presently pointed out. However, if the fact were otherwise, this would be ground for denying the review here sought but not for denying our motion to have petitioners' application for such review considered without awaiting the printing of the transcript. It surely does not require the printing of 5,000 pages of typewritten matter to demonstrate whether or not a federal question was raised.

The Facts Exhibit the Invocation of the Due Process Clause of the 14th Amendment at the Earliest Possible Moment and Its Reiteration in Both the Appellate Courts.

It is the **effect** *of the decision and judgment of the* Supreme Court of California—and not some matter to be reached by pleading *before* judgment—that first called for the invocation of the due process clause of the 14th Amendment. [Petition for Certiorari, p. 3.] These causes are, in this regard, totally different from those in which a statute is claimed to be unconstitutional under the due process clause, for there the opportunity presents itself to invoke the protection of the 14th Amendment in the pleadings as soon as an adverse right is asserted under the statute; but where it is the **effect** *of the judgment* that gives rise to the claim of constitutional protection, that claim cannot be made *prior* to judgment. A pleader would display naive ignorance who alleged that "if the judgment prayed for by plaintiff be entered, the

same will deprive defendants of their property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States."

Throughout this litigation, respondent's contention has been merely that when petitioners "are confronted with two alternatives, as they were in the period in 1937 here involved—the *beneficial use* of water or its *waste*—they must under the Constitution [of California] *beneficially use* the water rather than *waste* it." [Respondent's Petition for a Rehearing in the District Court of Appeal, p. 42.] For the first time, the decision of the Supreme Court of California injected into the cases the theory of a duty upon petitioners *to dispose of the surplus flow* of Owens River *not* needed by them, by transporting such surplus through their Aqueduct and *wasting* the same by discharging it on the Mojave Desert and into the Santa Clara River—a course that *cannot* be pursued by petitioners without their *acquisition of flowage rights* in respect of both places of discharge. Respondent's theory was much more modest since it comprehended only the *enforced use* of petitioners' *existing* facilities to a *greater extent* than petitioners had found it necessary to use them to render the service they had undertaken.

The claim of constitutional protection against the imposition of the duty thus *first suggested* by the Supreme Court of California was only called for after its decision declaring such duty and entailing the *acquisition* of flowage rights *not* possessed by petitioners. Up to that point, the constitutional guaranties (state and federal) had been invoked as against the imposition upon petitioners of the distinct duty of operating its *existing facilities* to a capacity in excess of their needs in order to withhold water from Owens Lake for respondent's benefit.

The Instances and Terms in Which Petitioners Invoked Constitutional Protection.

We subjoin, in chronological order, excerpts from the several briefs in the State Appellate Courts demonstrative of the sufficiency of petitioners' invocation of the due process clauses of both the State and the Federal Constitutions.

(1) At page 164 of petitioners opening brief, filed in the Supreme Court of California prior to the transfer of these causes to the District Court of Appeal for hearing, occurs the following:

> "The constitutional provision [of California forbidding the 'waste' of water, Art. XIV, Sec. 3] does not *attempt* to impose on the appropriator a *duty*, by *positive* measures *independent of his use*, to conserve water *not needed by him* in the interest of the State or of its individual citizens, inhabitants or property owners; and even if it had attempted so to do, the effort would have failed **as violative of the due process clause of the Constitution of the United States."**

This first invocation of the due process clause of the Federal Constitution was drawn forth by the trial court's findings (a) that petitioners' duty was to prevent the so-called "waste" of water entailed in its natural discharge into saline Owens Lake, the river's natural outlet [Finding 14, Clk. Tr. pp. 544-545], and (b) that if petitioners had employed other means *available* to them—*i. e.*, full capacity operation of their Aqueduct and reservoirs and the spreading of excess water upon petitioners' *own* lands —the result would have been to prevent such "waste" and to enable a beneficial use to be made of such surplus or of

a substantial portion thereof. [Clk. Tr. pp. 552-554.] This finding was in strict accordance with respondent's theory of its cases.

(2) The Attorney General of California filed a brief as *amicus curiae* in the District Court of Appeal in support of respondent. At page 4 of petitioners' reply thereto, which was served upon respondent, occurs the following:

> "If (as is the fact) defendants [petitioners herein] are fully meeting the demands upon them for water, then to require them to put the *surplus* waters to a beneficial use not comprehended within their undertaking to serve, is not 'to equitably *regulate* the flow of waters in [the State's] streams' [p. 8], but to *take* defendants' *property—i. e.*, the *use* of their Aqueduct—**without due process of law,** in violation of the **Fourteenth Amendment of the Constitution of the United States** and of Article I, Section 13, of the Constitution of California."

(3) Respondent, after the decision by the District Court of Appeal reversing the judgment of the trial court, applied for a rehearing in the former court. Petitioners filed an answer thereto wherein at page 37 reference is made to said "Reply to Brief of *Amicus Curiae*", and specifically to the portion thereof invoking the **due process clauses both of the 14th Amendment** and of Article 1, Section 13, of the Constitution of California. (See paragraph (2) *supra.*)

Thus, by the initial brief on appeal, filed in the Supreme Court of California, was invoked, in the plainest terms possible, the protection of the "due process clause of the

Constitution of the United States"; and in two subsequent briefs filed in the District Court of Appeal, the protection of the due process clauses both "of the 14th Amendment of the Constitution of the United States and of Article 1, Section 13 of the Constitution of California," was further claimed.

After reversal of the judgment of the trial court by the District Court of Appeal, respondent was granted a hearing by the Supreme Court of California, which court had before it all of the briefs theretofore filed as well as briefs subsequently filed. In respondent's petition for that hearing, it complained that the District Court of Appeal ignored the findings of the trial court that petitioners "*had a beneficial use* for the water" that flowed into Owens Lake; that "other means and methods of handling such waters * * * were available * * *;" that "*such other means and methods of disposition would enable the beneficial use of such water*, or a substantial portion thereof" [Clk. Tr. p. 554]; and that "the beneficial use of such water [as flowed into Owens Lake] is forever lost." [Clk. Tr. p. 545.] Thereupon respondent proceeded as follows: "The trial court found that appellants [petitioners herein] *had* a beneficial use for the water in their Aqueduct system—*not* that they had to *hunt up new beneficial uses* as the opinion erroneously states" [p. 41].

The Supreme Court of California, however, proceeds upon the theory of another and distinct duty owed by petitioners to respondent—namely, the duty of withholding *surplus* water from Owens Lake, by transporting the same

beyond the watershed and wasting it upon Mojave Desert and into Santa Clara River.

(4) The Attorney General, having again filed an *amicus curiae* brief reiterating his earlier views respecting the scope of the prohibition upon the waste of water in the Constitution of California, petitioners in reply on this head both to respondent and to *amicus curiae* referred to their answer to the brief of *amicus curiae* in the District Court of Appeal wherein the protection of the **due process clause** of both the State Constitution, Article 1, Section 13, and **of the 14th Amendment to the Constitution of the United States** was claimed as above set forth.

(5) After respondent was granted a hearing by the Supreme Court of California, petitioners filed a "Conspectus of the Salient Points Made by the Respective Parties." Therein at page 67 is noted respondent's contention that, by permitting the surplus water of Owens River to flow into Owens Lake, petitioners had "violated the [California] constitutional provision of Article XIV, Section 3, prohibiting the 'waste of water' ", and also petitioner's refutation thereof, as follows:

> "If the constitutional provision were construed as requiring defendants [petitioners herein] to *prevent a waste* of *surplus* water *entailed by natural conditions* irrespective of their having any use therefor, it would be *void* as a *taking* of their property,—*i. e.*, the use of the Aqueduct,—**without due process of law."**

(6) Respondent filed a reply to said Conspectus, and thereupon petitioners filed a Rejoinder, at page 39 of which they refer to their reply to said brief of *amicus curiae*

on the scope of the constitutional prohibition upon the waste of water. (See paragraphs (2), (3) and (4), *supra.*)

(7) After the decision of the Supreme Court, reversing the action of the District Court of Appeal and affirming the judgment of the trial court, petitioners applied for a rehearing, and at page 16 of their petition therefor occurs the following:

> "(c) DEFENDANTS' SUPPOSED OPPORTUNITIES FOR DISPOSING OF SURPLUS WATER.
>
> (1) *No large scale disposal* of surplus water can be made *unless* defendants do two or more of the following things:
>
> (i) *Construct* otherwise **unneeded reservoirs;**
>
> (ii) Use their lands for the *spreading of water* in **excess of their needs** for underground storage.
>
> (iii) *Purchase* land or *flowage rights* in lands for the **dissipation** of water by evaporation and percolation.
>
> (iv) *Acquire flowage rights* in the channel of Santa Clara River from riparian owners thereon.
>
> (v) Devote **unneeded** and **hitherto unused** *aqueduct capacity* for the transportation of water to any of such points of disposal as may be acquired below Haiwee Reservoir.
>
> "(aa) To require defendants so to do *for the benefit of plaintiff,* would be a **confiscation** of defendants' property in violation of the **constitutional guaranties** against the taking of property *without compensation* or **without due process of law."***

*This subparagraph (aa) is alone referred to by respondent as representative of petitioners' mode of raising the federal question. [Statement, p. 2, footnote 2.]

Whatever might be the shortcomings of this last claim to the constitutional protection if that claim stood by itself, it is not subject to any criticism on the ground of insufficiency when regard is had to the fact that the same claim was made with specific reference to the due process clause of the 14th Amendment of the Constitution of the United States on five, if not six separate occasions in the briefs previously filed. It is quite within established and recognized practice to cite a statute or a case *once* with *particularity* and thereafter refer to it throughout the litigation by any brief locution that will identify it with such initial citation. Thus, having referred to the due process clause of Article XIV of the Amendments to the Constitution of the United States, it may therafter be referred to as the "due process clause" without more. Moreover, although it has been held that a reference to the "due process clause of the Constitution," without more, is insufficient to raise a federal question in a case where, in addition to that clause in the 14th Amendment, there is a like clause in the Constitution of the State in which the action arose, in the causes at bar, the repeated references in the earlier briefs to the "due process clauses" both of the Constitution of the United States and of the Constitution of California, render it impossible to construe the reference in the *plural* to the "constitutional guaranties against the taking of property without due process of law," appearing in petitioners' application for a rehearing in the State court, otherwise

than as inclusive of the respective guaranties of that character in each of said Constitutions.

In Section 82 of "Jurisdiction of the Supreme Court of the United States" by Reynolds Robertson and Francis R. Kirkham (the latter being one of counsel for respondent herein), the rule is thus stated:

> "The contention that the federal question was raised in language of too general a character *will fail* if, from inspection of the whole record, it appears that a certain provision of the federal Constitution, treaties or laws was relied upon to sustain a specific right, or a certain state statute was attacked as denying definite rights. No particular form of words or phrases is essential. It is necessary only that the federal claim and the ground therefor be brought to the attention of the state court with *'fair precision'*; 'and if the record as a whole shows *either expressly or by clear intendment* that this was done, the claim is to be regarded as having been adequately presented.' The rule has been said to be that 'although * * * the particular act of Congress, or part of the Constitution supposed to be infringed by the State law, ought to be *pointed out*, it has *never* been held that this should be done *in express words*. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on * * *'."

Numerous cases are cited in support of this text.

Conclusion.

We have demonstrated (as we think),

(1) That respondent's contention that no federal question is raised, even if sound, would not call for a denial of the motion to consider the petition for certiorari on the typewritten record before the same be printed.

(2) That respondent's statement that no federal question was raised by petitioners in the State courts is utterly erroneous and, we fear, not inadvertently so.

It is respectfully submitted that said motion to proceed herein should be granted as being in the interest of expedition and over-all economy. Counsel for petitioners, after a full review of both the Clerk's Transcript and the Reporter's Transcript, submitted to respondent a list of the passages, selected with liberality yet embracing not more than 15% thereof, as all that need be printed for all purposes. Respondent's insistence upon the printing of the entire record exhibits an utter disregard of the course prescribed by this court in its rules looking to the curtailment of such records.*

---

*For example, no question is or can be made respecting the damage to defendants' physical properties; the ability of petitioners to spread additional water in Owens Valley; the availability of brines in Owens Lake suitable for processing in respondent's Mono Plant; the plant apparatus and the physical and chemical details of such processing; respondent's investment and properties; or the detrimental lowering of the alkalinity of the brines by the incursion of water into the lake, *etc., etc.* The testimony on these issues fills by far the larger part of the nine volumes of the Reporter's Transcript. It seems to us that every question raised by the petition for certiorari could be determined by reference to comparatively few of the exhibits on file as part of the record, and that, if such petition be granted, the only other portion of the record that need be referred to is that bearing on the allowance of damages for prospective profits,—a non-jurisdictional question to which the court's attention will be then invited.

Dated at Los Angeles, California, this 13th day of March, 1944.

Respectfully submitted,

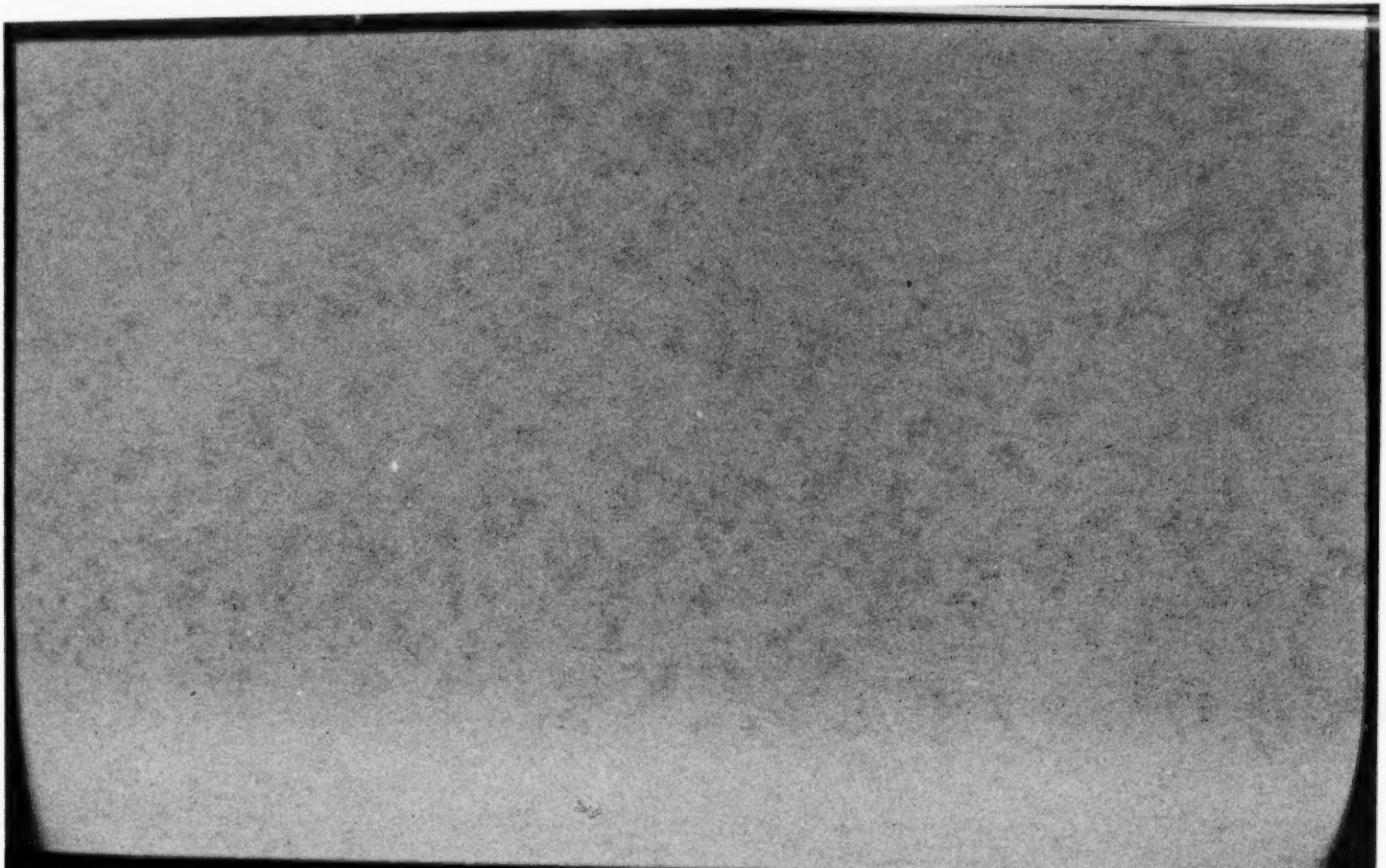
RAY L. CHESEBRO,
City Attorney,

S. B. ROBINSON,
Chief Assistant City Attorney for Water and Power.

SAMUEL POORMAN, JR.,
Assistant City Attorney.

A. E. CHANDLER,
Special Counsel,

By SAMUEL POORMAN, JR.,
Counsel for Petitioner.



Service accepted this.....day of March, A. D. 1944.

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Counsel for Respondent.

3-13-44—65

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MAR 17 1944
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In the Supreme Court
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United States

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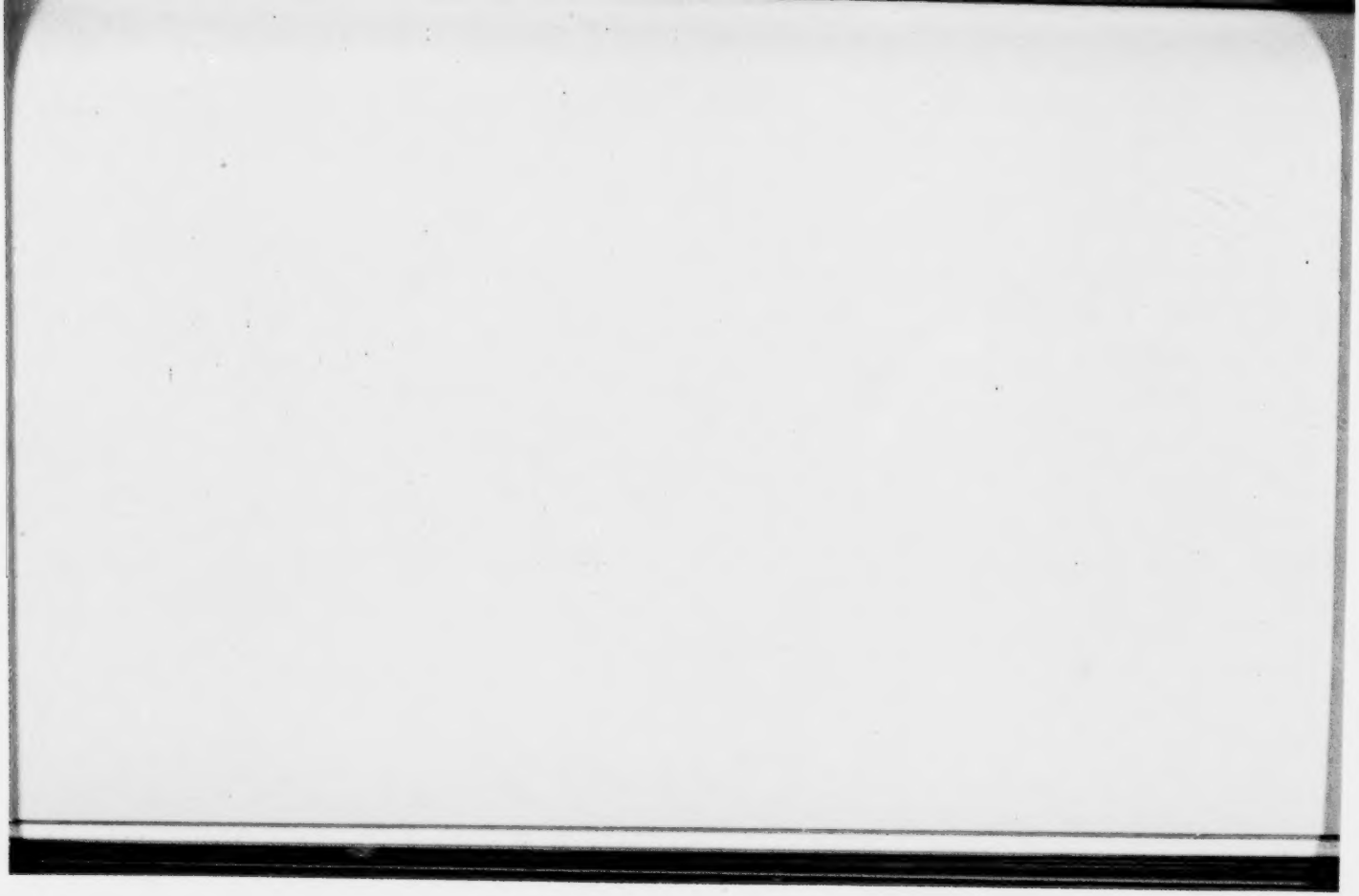
RESPONDENT'S REPLY TO PETITIONERS' REPLY ON MOTION FOR LEAVE TO PROCEED ON TYPEWRITTEN TRANSCRIPT.

KENNETH FERGUSON,
FRANCIS R. KIRKHAM,
JESS G. SUTLIFF,
Counsel for Respondent.

DAD-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA



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RESPONDENT'S REPLY TO PETITIONERS' REPLY ON MOTION FOR LEAVE TO PROCEED ON TYPEWRITTEN TRANSCRIPT.

Since petitioners have questioned the accuracy of our statements regarding the raising of a federal question (Petitioners' Reply, p. 11), we respectfully ask leave to direct the Court's attention specifically to the record.

No federal question was raised in petitioners' demurrer (Cl. Tr. 272-321)[1] or amendment thereto (Cl. Tr. 341-345), or in the motion to strike portions of the complaint (Cl. Tr. 331-337), or in the briefs ("points and authorities") filed by petitioners in support of the demurrer (Cl. Tr. 322-328) and motion to strike (Cl. Tr. 338). No federal question was raised in the answer (Cl. Tr. 353-438) or its amendment (Cl. Tr. 513-517), although the amendment was filed after the trial. No federal question was raised in the motion for judgment and kindred motions made by petitioners at the conclusion of respondent's case, or in the rulings of the court on those motions (Rep. Tr. 2343-2350). No federal question was raised in petitioners' opening statement (Rep. Tr. 2352-2356). No federal question was mentioned or decided by the trial court in its opinion (Cl. Tr. 500-502), or in its findings of fact and conclusions of law (Cl. Tr. 519-561, 561-568) or judgment (Cl. Tr. 571-573). No federal question was raised in petitioners' motions for new trial (Cl. Tr. 577, 580), or in the orders of the court denying those motions (Cl. Tr. 588, 589, 591).

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[1]The record being unprinted, references in this brief are to the three volumes of unprinted Clerk's Transcript ("Cl. Tr."), and to the nine volumes of unprinted Reporter's Transcript ("Rep. Tr.").

Since petitioners prevailed in the companion injunction suit, we do not refer specifically to the pleadings in that suit. Those pleadings are in Cl. Tr., Vol. I, and contain no reference to a federal question. The injunction suit and damage suit were consolidated for trial (Cl. Tr. 114).

At the time the appeal in this case was taken,[2] Rule VIII of the Rules of the Supreme Court and District Courts of Appeal of the State of California provided:

> "Sec. 2. A statement of the question involved on an appeal in a civil action shall be set forth on the first page of the appellant's opening brief, and without any other matter appearing thereon."

No federal question was raised by petitioners in the "Statement of Questions Involved" filed by them in compliance with this rule. That statement, which appears in petitioners' opening brief in the state supreme court,[3] reads as follows:

> "STATEMENT OF QUESTIONS INVOLVED.
>
> (1) Is an appropriator from a stream emptying *naturally* into a *saline lake* obligated to a manufacturer of products from lake brines (a) to divert and/or conserve water *in excess* of appropriator's *needs* up to the *capacity* of its *aqueduct and reservoirs*,—same having excess capacity looking to *future growth* of needs,—or (b) to provide *additional* headwater *reservoirs* to *retain* the stream *flow* in *excess* of such *needs*?
>
> (2) Is manufacturer, because appropriator's *diversions* in *prior* years of *lower stream flow* constituted a *greater proportion* thereof, entitled to rely upon diversions up to such *capacity* in years when, due *solely* to *increased flow*, the *diversions* constituted a *less proportion* thereof?
>
> (3) Is appropriator obligated under Constitution, Art. XIV, Sec. 3, to *prevent* stream flow *not diverted*

[2]New appellate rules recently have been adopted in California.

[3]The original appeal in this case was taken to the state supreme court, and the opening brief was filed in that court. Thereafter the cause was transferred to the District Court of Appeal for initial hearing.

(because *not needed*) from *discharging* into *saline lake*?[4]

(4) Can loss of *prospective profits* from business interruption (a) constitute the measure of damages where such business is *non-unique;* or,—*losses* having resulted from *past experience,*—(b) be proven by *estimates* based upon a *doubling* of *plant capacity* (i) installed *after* such interruption, and (ii) *never* utilized *prior* to trial?

(5) Did damage, *inevitable* from water in saline lake, *occur* when lake reached *highest level,* or when it had *subsided* through evaporation?''

It is settled by California decisions that the California appellate courts are not required to pass on a question not stated as a "question involved" on the first page of the opening brief.[5]

Metzler v. Foster Holding Co. (1936) 5 Cal. (2d) 278, 282;

Caspar Lumber Co. v. Stowell (1940) 37 Cal. App. (2d) 58, 63.

The California courts also follow the general rule "that a constitutional question must be raised at the earliest opportunity or it will be considered as waived" (*Hershey v. Reclamation District No. 108* (1927) 200 Cal. 550, 564).

In this case neither appellate court passed upon a federal question.[6]

---

[4]This reference is to the Constitution of the State of California.

[5]This is a rule of practice given effect by this Court. See *Bryant v. Zimmerman* (1928) 278 U.S. 63, 68-69.

[6]See the opinions of the District Court of Appeal and the Supreme Court printed in the appendices to the petition for writs of certiorari.

The references to federal questions quoted by petitioners from their briefs in the courts below (Petitioners' Reply, pp. 4-6, 7-8) are, we repeat, mere passing references in the course of argument extending over hundreds of printed pages.[7] No one of them appeared in any heading in any one of petitioners' briefs. Rule VIII, already referred to, further provided:

> "The brief or petition must present each point separately under an appropriate heading, showing the nature of the question to be presented or the point to be made."

Under California practice these headings in the brief are treated as, and are deemed to be, assignments of error, and the California courts repeatedly have held that they will not consider points not separately stated under an appropriate heading as required by Rule VIII. Thus, in *Superior Sand Co. v. Smith* (1937) 19 Cal. App. (2d) 166, 167 (hearing denied by the California Supreme Court, April 8, 1937), the court said:

> "Appellant has failed in his opening brief to present each point separately under an appropriate heading, showing the nature of the question to be presented and the point to be made. (Sec. 2, rule VIII, Rules for the Supreme Court and District Courts of Appeal of the State of California.)
>
> Mr. Presiding Justice Conrey in *Adams v. Standard Acc. Ins. Co.,* 124 Cal. App. 393 [12 Pac. (2d) 464], in commenting upon this provision of Rule VIII, *supra,* accurately states the requirement thus at page 394:
>
> 'Such assignment of error should take the form of one or more stated propositions, which, if sustained,

[7]There were 17 briefs, with a total of 1277 pages, filed in the District Court of Appeal and Supreme Court.

would lend reasonable support to appellant's demand for reversal of the judgment.'

This court has repeatedly held that it will not assume the task of searching the record for the purpose of discovering errors not pointed out by counsel. It is the duty of counsel to comply with rule VIII, *supra*, in its entirety. The provisions of this section are not mere technical requirements, but are prescribed for the purpose of facilitating disposition of cases upon appeal and directing the court's attention to the specific errors of law alleged to have been committed by the trial court.

For the foregoing reason the appeal is dismissed."

Dated, San Francisco, California,
March 15, 1944.

Respectfully submitted,

KENNETH FERGUSON,
FRANCIS R. KIRKHAM,
JESS G. SUTLIFF,
Counsel for Respondent

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

Supreme Court, U. S.
FILED
APR 15 1944
CHARLES ELMORE CROPLEY
CLERK

No. 723

(Consolidated Causes: California Supreme Court, L. A. No. 18,066)

CITY OF LOS ANGELES (a municipal corporation), DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,
Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY (a corporation),
Respondent.
(Superior Court No. 3783)

CITY OF LOS ANGELES (a municipal corporation), DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,
Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY (a corporation),
Respondent.
(Superior Court No. 3817)

BRIEF OF AMICUS CURIAE ON BEHALF OF IRRIGATION DISTRICT ASSOCIATION OF CALIFORNIA.

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(Superior Court No. 3817)

BRIEF OF AMICUS CURIAE ON BEHALF OF IRRIGATION DISTRICT ASSOCIATION OF CALIFORNIA.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Irrigation District Association of California hereby requests leave to file this brief of amicus curiae on the hearing in this Court of the above entitled causes. This is the first time this association has appeared in these causes.

The matters involved here are of utmost importance not only to the one hundred and some odd irrigation districts in the State of California containing acreage running into the millions and with appropriation on every major stream with diversion works from single diversion canal and weir, similar to the works described in these causes, to multiple purpose reservoirs but to all appropriators not only of this State but to all states where the law of appropriations of water exists, for the effect of the decision of the Supreme Court of California is to legislate a new law which abrogates existing law as to the rights and duties of appropriators.

The effect of this new law obligates an appropriator of water in California to be responsible for water which he does not own, that is to all the water in a stream over and above his appropriative right. It places the burden on him of seeing that this water he does not own causes no one injury. If it does he is responsible in damages. This would be depriving him of property without due process of law.

The Supreme Court of California sought legal foundation for this new duty on the basis that the diversion works of the appropriator were permanent in character and therefore the canal had become the natural channel and the original channel below its weir had lost its character as a natural channel. Let it be pointed out here that in cases where an artificial channel by usage has become a natural channel, all the incidents of a natural channel also attach to-wit: lands bordering on such channel are riparian thereto. Would the lands bordering the aqueduct of the City of Los Angeles be said to be riparian thereto? The diversion works in the instant case are no different than the diversion works of hundreds of other appropriators.

An appropriator of water owns at a given time no more water than what he can put to a beneficial use. Water in excess of such use does not belong to him, he has no right to interfere with its natural flow down its stream bed and having *no right* thereto *no duty* attaches.

The following are excerpts from the Constitution and Water Code of California. The Water Code became law in 1943 and is a codification without change in substance of the existing law.

> "The right to water or to the use or flow of water in or from any natural stream or water course in this state is and *shall be limited to such water as shall be reasonably required for the beneficial use to be served,* and such right does not and shall not extend to the waste or unreason-

able use or unreasonable method of use or unreasonable method of diversion of water."

Article XIV, par. 3, Constitution of Cal.

The above section was first applied in *Gin S. Chow v. Santa Barbara,* 217 Cal. 673 [22 P. (2d) 5]. It was carefully analyzed and applied in *Peabody v. City of Vallejo,* 2 Cal. (2d) 351 [40 P. (2d) 486], where the Court said:

"The limitations and prohibitions of the constitutional amendment now apply to every water right and every method of diversion. Epitomized, the amendment declares:

1. The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served.

2. Such right does not extend to the waste of water.

3. Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

4. Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.

The foregoing mandates are plain, they are positive, and admit of no exception. They apply to the use of all water under whatever right the use may be enjoyed."

The Water Code provides as follows:

"All water within the State is the property of the people of the State, but the right to the

use of water may be acquired by appropriation in the manner provided by law."

Section 102, Water Code of California.

"The following are hereby declared to constitute unappropriated water:

(a) All water which has never been appropriated;

(b) All water appropriated prior to December 19, 1914, which has not been in process, from the date of the initial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary properly to utilize it for the purpose of the appropriation, or which has not been put or which has ceased to be put to some useful or beneficial purpose;

(c) All water appropriated pursuant to the Water Commission Act or this code which has ceased to be put to the useful or beneficial purpose for which it was appropriated, or which has been or may be or may have been appropriated and is not or has not been in the process of being put, from the date of the initial act of appropriation, to the useful or beneficial purpose for which it was appropriated, with due diligence in proportion to the magnitude of the work necessary properly to utilize it for the purpose of the appropriation;

(d) Water which having been appropriated or used flows back into a stream, lake or other body of water."

Section 1202, Water Code of California.

Therefore an appropriator only owns at a given time the right to use the water in a stream to the extent of the beneficial use, and water in the stream in excess of the use is owned by the State.

The effect of the new law is to make an appropriator custodian of and responsible for all the water in a stream in excess of that which at a given time he may use whether the title thereto is in the State or another user thereof. This fact makes it a federal question as constituting a right reserved in the Constitutions, Federal and State. There is just as much right in applying such doctrine to an appropriator of water as there would be in applying such doctrine to a rancher who, having caged a lion, is made responsible for the depredations of all the lions left on the range, or because a person owns an automobile to make him responsible for the damage caused by automobiles owned by others.

To let this decision stand in the case law of California is an open invitation to every occupier of a downstream channel to sue an upper appropriator for any damages he may suffer from the water flowing in the stream.

The Supreme Court of the United States is the last resort of a citizen of the United States whose constitutional rights have been invaded. We say that the constitutional rights of all appropriators of water have been invaded by this fiat of the Supreme Court of the State of California.

It cannot be said that the decision is isolated and only affects the rights and duties of the appropriator

in the instant causes. We are confined to the four corners of that decision and the language therein is so indefinite, so general, that it is open to the widest interpretation and application. For example, in the opening paragraph the Court states:

> "In 1913, the defendant City of Los Angeles completed its aqueduct to the Owens River Valley and, from 1919 to 1937, diverted into it *virtually all the flow of the* Owens River, * * *"

It does not say all the flow but part of the flow. How much of a flow must continue down a natural channel to keep such channel natural? Must it exist every year even in years of drought when all the flow is absorbed by some of the prior appropriators on a stream?

The effect of the decision is to create a new law, which law is in contravention of the Constitution in that it takes property without due process.

Dated, Fresno, California,
April 12, 1944.

Respectfully submitted,
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A. L. COWELL,
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W. H. JENNINGS,
C. F. METTEER,
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Attorneys for Irrigation District Association of California.

Due service and receipt of a copy of the within is hereby admitted

this.....day of April, 1944.

.....

City Attorney, City of Los Angeles,

.....

Chief Assistant City Attorney, City of Los Angeles, for Department of Water and Power of the City of Los Angeles,

.....

Assistant City Attorney, City of Los Angeles,

.....

Special Counsel,
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.....

.....

Attorneys for Respondent,
Natural Soda Products Company.

(30)

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Supreme Court of the United States

October Term, 1943

No. 723

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

PETITION FOR A REHEARING ON DENIAL OF CERTIORARI.

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Supreme Court of the United States

October Term, 1943
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CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

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vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent.

PETITION FOR A REHEARING ON DENIAL OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the above-named petitioners City of Los Angeles and Department of Water and Power of The City of Los Angeles and present this their petition for a rehearing of the petition for certiorari in these causes.[1]

[1]We are advised that, impelled by the grave,—not to say ruinous,—consequences entailed by any application of the legal doctrine which, for the first time in legal history, has been engrafted upon the law of waters by the State court's judgment herein, the Irrigation Districts Association of California (an organization of over 100 irrigation, water, reclamation and drainage districts), representing a service area of more than four million acres (population in excess of five hundred thousand, and assessed valuation of more than one billion dollars), is about to apply to this Court for leave to file a brief as *amicus curiae* in support of this petition for a rehearing.

I.

Jurisdiction.

Petition for certiorari was filed and docketed February 23, 1944, and was denied March 27, 1944. This petition is filed within less than 25 days after such denial under **Rule 33.**

II.

Reasons for Petition for Rehearing.

On re-analysis, it is found that the petition for certiorari and the supporting brief in some instances failed to point out specifically, and in others failed to develop adequately, the following matters, certain thereof going to the jurisdiction and others to the merits:

The judgment of the Supreme Court of California deprives petitioners of their property without due process of law, in violation of the 14th Amendment of the Constitution of the United States, not only in the **four particulars** pointed out in paragraph (2) *infra*, but also in the **two additional** particulars noted in paragraph (3) *infra*.

The judgment of the *trial court* is based upon a finding that the **surplus** waters **not diverted** by petitioners in 1937 "were waters for which **[petitioners] could insure, and had, beneficial use"** [Respondent's Petition for Rehearing in the State Supreme Court, page 41]. Standing upon this finding, respondents **repeatedly disclaimed** any contention that petitioners were **obligated to find new beneficial uses** for such **surplus waters.** For example, in respondent's Reply to Appellants' Conspectus, at page 45, respondent declares: "It is

not true * * * that respondent * * * *contends* that the effect of Article XIV, Section 3 [of the Constitution of California] is to make it mandatory upon [petitioners] * * * **to find new and greater beneficial uses for water,"** but only that they are thereby "required to **beneficially use** water in their **existing facilities** rather than waste it." This *supposed* beneficial use was the presently **unneeded storage** thereof, both surface and underground, to conserve the surplus waters for future use by petitioners **and others.** It was the *effect* of this judgment at which petitioners directed their *first* constitutional attack.

Note that the *trial court's* judgment contains *no intimation* of an obligation on the part of petitioners to transport *surplus* water out of the watershed of its origin and to **waste** the same elsewhere. The *first departure* from this view of petitioners' duty was made by the *judgment of the State Supreme Court,* which fastened upon petitioners the additional obligation of **wasting** so much of this *surplus* water as could be transported to points of discharge on the Mojave Desert and into the Santa Clara River (thus entailing the acquisition of the necessary flowage rights), and then of *spreading* any *portion* of the surplus *not so wasted* upon lands in Owens Valley.

Obviously, therefore,

(1) Two distinct Federal questions arose during the progress of these causes through the State courts.

(a) The first thereof arose by reason of the **effect of the judgment** of the *trial court.*

(b) The second arose only by reason of the **more comprehensive effect of the judgment** of the *State Supreme Court.*

Accordingly, there were two distinct invasions of petitioners' constitutional rights, and petitioners in each instance raised the Federal question at the first opportunity and in the only manner at those respective times available to them under State practice, namely, (a) in respect of the first invasion, by their Opening Brief on appeal in the State Supreme Court, and (b) in respect of the second invasion, by their Petition for Rehearing by the State Supreme Court following its affirmance of the judgment below,—the first and only opportunity for its presentation in that Court.

On *five* occasions in their briefs on appeal prior to the judgment of the State Supreme Court, petitioners raised the Federal question, stating that the **effect** of the judgment of the *trial court* was to deprive them of their property without due process of law in violation of the due process clauses of the 14th Amendment to the Constitution of the United States and of the State Constitution, Article I, Section 13. After judgment by the State Supreme Court, not only was the same Federal question raised for a *sixth* time as against *that* judgment [Petition for Rehearing, page 16], but at the **then first opportunity,** there was *specifically* pointed out the **new and additional deprivation** of property **first effected** by the **judgment** of **that** court in rendering it **further obligatory** on petitioners **to acquire flowage rights,** as next hereinafter indicated. [For the particulars respecting these invocations of constitutional protection, see petitioners' Reply to Respondent's Statement in Opposition to Motion for Leave to Proceed, *etc.*, pp. 2-10.]

The District Court of Appeal had no occasion to consider the constitutional question because its decision was in

favor of petitioners upon the wholly distinct grounds set forth in its opinion. That its judgment was *in strict conformity* to the *prior* law of California as established by the decisions of its highest court, is demonstrated in our Petition for Certiorari and the supporting brief herein.[2]

(2) On the one hand, the **effect** of the judgment of the *trial court* was to impose upon petitioners, in favor of respondent, *four several duties* to dispose of *surplus* water *not* needed by petitioners, namely,—

(a) To operate their *Aqueduct* **to capacity;**

(b) To dispose of **surplus** water by **spreading** upon their own lands;

(c) To operate their *reservoirs* **to capacity;** and

(d) To operate the **regulatory** *reservoir* (Tinnemaha) for the **storage** of *surplus* water, thereby *destroying* its *function* as a stream regulator at the *very time* when the same is *needed.*

---

[2]In addition to the cases cited in our Brief on Certiorari demonstrating (as we think and as the District Court of Appeal, in reversing the judgment, held), that such a ruling as that whereof review is sought, is *diametrically opposed* to the *prior* law of California, we cite *Moore v. City of Los Angeles,* 72 Cal. 287, only now discovered. There it was contended by appellant that "The defendant, being the owner of the river-bed, and having the *right to divert the water,* as a private corporation, was bound to so control its property that it could work no injury on anyone." This contention, almost identical with that of respondent herein, was rejected, the State Supreme Court saying:

> "The incorporated city was not responsible as a private corporation, from the fact that it owned the bed of the river, and the right to sell the water therefrom to its citizens, and there is nothing contained in its charter which could impose such an obligation upon it, as the duty of protecting private property from sudden and unlooked for floods, which might at any time fill the stream to overflowing."

(3) On the other hand, the **effect** of the judgment of the *State Supreme Court* was **not only** to impose on petitioners, in favor of respondent, *these four several duties*, but the **two further distinct and more onerous duties**, namely,—

(a) That of **acquiring flowage rights** in lands on the *Mojave Desert*, and

(b) That of **acquiring flowage rights** in the channel of the *Santa Clara River*,—

to enable petitioners to dispose of **further** *surplus water* by **wasting** the same on said desert and into said river channel.

(4) As such Federal questions could **not** be raised by *pleading*, *now* to rule that the raising thereof *after judgment* was not *timely* would *itself* be a denial of constitutional protection.

(5) Even if the raising of the Federal question had been too late in respect of the *effect* of the judgment of the *trial court*, (because it came after motion for a new trial), it was *unquestionably timely* in respect of the *effect* of the judgment of the *State Supreme Court*, which judgment (after *reversal* of the *trial court* by the District Court of Appeal *on the merits*, without reference to the constitutional question raised), for the **first** time **injected** into the causes the **two** *new and distinct* duties of **acquiring such flowage rights** on the Mojave Desert and in the Santa Clara River, where (as was *affirmatively*

proved without *contradiction*), petitioners have no such flowage rights.[3]

(6) The respective judgments of the *trial court* and of the Supreme Court of California having been a **total departure** from its **own** and **all other** decisions, American and English (except the utterly discredited *Kray v. Muggli*, 84 Minn. 90 [see Brief on Certiorari, page 69, footnote 4]), these causes present that element of **surprise** that *of necessity* (for lack of earlier opportunity) permits petitioners to raise said several Federal

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[3]Respondent has made the point that under Rule VIII, Section 2, of the state appellate courts, the Federal question was not properly raised because of lack of "a statement of the question involved * * * set forth on the *first page* of the Appellants' Opening Brief." [Statement of Respondent in Opposition to Motion for Leave to Proceed, *etc.*, page 2, footnote 1.] There are two answers to such point:

(a) The Federal question was *not* an *original* one in the causes, but was first imported thereinto by the successive judgments,—first that of the *trial court* and later that of the state Supreme Court. It was perfectly proper, therefore, to raise it in the text of Appellants' Opening Brief to meet anticipatorily an *adverse ruling* on the *primary* points printed on the first page of the Opening Brief.

(b) Rule VIII does not, by its terms, apply to a petition for a rehearing, nor could it be made to so apply in respect of a point first imported by the judgment as to which a rehearing is sought.

Moreover, it would be an extraordinary thing to deprive a litigant of constitutional protection for failure to observe a rule of convenience, prescribing the *mechanical arrangement of Opening Briefs*. If the state court gave attention to the primary points printed on the first page of petitioners' Opening Brief, they could not have escaped notice of the Federal question that was inherent in an adverse ruling thereon as was specifically pointed out in the text of the briefs.

We submit that it is not competent for a state court, by its rules, either (a) to curtail the jurisdiction of this court, or (b) to modify the Judicial Code, or (c) to limit the operation of the Constitution of the United States.

questions *after* the respective *judgments* by which they were successively *injected into the causes.*[4]

Although petitioners raised the point in their application for certiorari herein [pp. 3, 14, 34, 80-81], it will be borne in mind that they had on six different occasions in the State courts claimed Federal rights, thereby invokng "their advertent decision thereon."

(7) The reversal of the judgment of the trial court by the District Court of Appeal is a demonstration that petitioners *could not reasonably have anticipated* either that judgment, or the affirmance thereof by the State Supreme Court after such reversal.

(8) The wide-spread, ruinous, and recurrent consequences, *in practical application,* of the doctrine laid down by the State Supreme Court,—not merely to petitioners, but *to every appropriator of water* in California,—should

---

[4]In Robertson and Kirkham on "Jurisdiction of the Supreme Court of the United States," section 73, page 123, reads as follows:

> "§ 73. - - - *'Surprise' Cases.* In *Saunders v. Shaw,* [244 U. S. 317, at 320], it was held that where it is the *act* of the *state supreme court itself,* done in *its opinion and decision* and coming *unexpectedly* at the end of the proceeding when appellant *no longer had any opportunity* to add to the record, which denies appellant a federal right, and thus, for the *first* time, *imports* into the case the *federal question* sought to be reviewed, a raising of the question *for the first time* in the assignment of errors accompanying a *writ of error* (now appeal) to the Supreme Court [of the United States] will be deemed to be *timely.* There is *no* apparent reason why the principle of this rule should *not* apply to cases reviewable on *certiorari,* in which event, in a like case save that the questions involved are such as to be reviewable on certiorari rather than appeal, a raising of the federal question *for the first time* in a petition for certiorari would be held *timely.*"

move this Honorable Court, in its sound discretion, *to take jurisdiction,* for the purpose of correcting the State court's manifest error, in conformity with the practice so recently pursued as 1942 in *Memphis Gas Company v. Beeler,* 315 U. S. 649, on appeal from the Supreme Court of Tennessee.[5]

A correct ruling herein *on the merits,* in accordance with **all prior unquestioned authority** (including the decisions of the Supreme Court of California), and determining (a) the *obligations* of an *appropriator* of water to a *downstream proprietor,* (b) the *extent* of the *rights* that may be *acquired by estoppel* or as a *reciprocal easement,* and (c) the *possibility* or otherwise of any such rights *arising* in favor of the downstream proprietor who, before acquiring his property, merely **"assumed"** (*without any inquiry whatever*), that the lake constituting the *natural place of discharge* of the stream from which the appropriator diverts, **would continue dry** because it was dry *then,—i. e., after 12 years' unprecedented drought,*—must have resulted in a different disposition of these causes, to wit, a reversal of the judgment of the trial court.

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[5]In the opinion of the court in that case, delivered by Mr. Chief Justice Stone, it is said:

> "Since it does *not* appear that the validity of the statute was either *drawn in question* or *passed upon* in the *trial* court or *deemed* by the *state supreme* court *to be in issue,* we must dismiss the *appeal* for want of jurisdiction. Treating the papers on which the appeal was allowed as a petition for writ of certiorari, * * * certiorari is *granted,* and we proceed to *consider the merits* of the case." [p. 651.]

III.

The Controlling Question.

In a nutshell, the theory of the state court's decision is (a) that petitioners had pursued a *course of conduct* (*i. e.*, continuously diverting the **whole** flow of Owens River), upon which the respondent had a *right to*, and *did, rely;* (b) that *in 1937*,—specifically from February to June, inclusive, of that year,—petitioners **changed** that *course of conduct;* and (c) that, **by reason of such change,** respondent was damaged.

The discharge from Owens River into Owens Lake is the **resultant** *of two factors,* (1) *stream flow* at Intake, and (2) petitioners' *diversions* therefrom. The lake discharge is the **residual** water *left in the river channel.* If petitioners **past** diversions from *1919 to 1936* be the **standard of conduct** by which petitioners' *future duty* to divert was *imposed* and **measured,** then there was *no breach* of such duty in 1937 since their diversions, both during **that** year and also during **the months thereof** here in question (February to June, inclusive), **exceeded the maximum** *during any prior corresponding period* and, by much more, the respective averages for the *prior* 18 years of drought (1919-1936).

Therefore, the *termination* in 1937, of the prior *dry condition* of Owens Lake was *due*,—**not to any deviation** by petitioners from such *standard of conduct*,—but to the **increase** in the flow of Owens River upon the recurrence, *after 18 years' unprecedented drought,* of a year of *greater than normal precipitation.* Obviously, you can-

not, *with such increase*, have the lake discharge remain as low as theretofore if petitioners' *diversions* in 1937 either (a) **continued** in *volume* merely **equal** to those in prior years, or (b) were **not increased** by the *same* amount as was the *river flow*.[6]

The court's decision makes petitioners responsible,—**not** for **deviation** from *their* **prior** *conduct*,—but for the **increased precipitation** in the watershed. Assuming *ever* **constant** *river flow* and *ever* **constant** *diversions*, it would be no more reasonable to hold petitioners *responsible* for a *rise* in the *lake level* due to **lowered evaporation** on Owens Lake in a year of continuous low temperatures and cloudy weather. The fallacy in logic in both instances is a not uncommon one,—namely, that of reasoning *post hoc*, **ergo** *propter hoc*.

As shown by the **uncontradicted evidence** introduced by *respondent*;—

(a) Petitioners' *prior* course of *conduct* was to *divert* from Owens River **only that portion** of the flow there-

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[6]The factual data is set forth in Tables I and II in our Brief on Certiorari [pp. 42-43]. In Column (f) of Table II,—that table covering the period from February to June, inclusive, in each year from 1906 to 1937,—it appears that petitioners' diversions from Owens River in those months of **1937 were 126,000 acre feet** as contrasted with a **maximum prior diversion of 116,000 acre feet** (1922), and diversions during the *five years preceding 1932* (when respondent acquired its property on Owens Lake) ranging from a **minimum of 62,000** to a **maximum of 101,000 acre feet.**

See, in this connection, *Great Northern Railway Co. v. Washington*, 300 U. S. 154, at 165, declaring that "when the asserted [Federal] right has been denied, this court is [**not**] concluded by a mere finding of fact or a mixed finding of law and fact made by the state court. We have repeatedly held that in such case **we must examine the evidence** to ascertain whether it **supports** the decision **against the claim of federal right.**"

of which was *from time to time required for their needs,* and that at all times when that flow was *in excess* of such needs, the **surplus** followed its **natural course** down the *channel* of Owens River to its **natural place of discharge** into Owens Lake.[7]

(b) Petitioners **did not change** this course of conduct in 1937, but, on the contrary, in pursuing that **identical course** of conduct, diverted both in the year 1937, as also in the months thereof from February to June, inclusive, here in question, **more water than** they had **ever theretofore** diverted during any corresponding period; and

(c) The damage suffered by respondent was **not caused** by any **change** in petitioners' **course of conduct** (for there was **no such change**), but **solely** by the fact that the *excess* of the *natural* river flow (which whenever there was **any** had **always** flowed into Owens Lake), was **far greater** than any excess thereof that had been present in Owens River during the period of respondent's prior operations, although **not greater** than, nor **even as great as,** in *each* of the years **preceding the drought.**

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[7]The fact that, by reason of the worst and most prolonged **drought** ever experienced in the watershed during **17 years prior** to 1937, there was **no such excess,** and that, in consequence, Owens Lake became relatively dry, is a circumstance **wholly irrelevant** as well as completely **confusing** and **misleading.**

The opinion of the District Court of Appeal (reversing the judgment of the trial court) exhibits a clear apprehension of this factual situation, but that of the Supreme Court of California **completely misses the determinative facts.** But for the substitution by the latter court of a **supposititious** state of facts by eliminating the controlling factors in the **true** state of facts, the court could **not** (as we confidently believe) have fallen into error in respect of the *controlling points of law;* for we cannot conceive of its harboring an intention to change the law (as said decision *does*), by *establishing* the following as principles:

(1) That an *appropriator* of the water of a stream is **obligated to divert** therefrom water for which he has **no beneficial use,** disposing of this *unused* water *at his own expense,* because (a) of *resulting benefits to a downstream proprietor* and (b) because he has *unused conduit capacity* sufficient to enable him so to do;

(2) That an appropriator who has diverted water over a series of years, in amounts **uniformly determined** *by the demands served* by him, using *only part* of the *capacity* of his conduit built in *anticipation* of the *growth of those demands,* is **obligated**—*not* merely to *continue diversions* measured either by *current demands* or by his *maximum prior diversions,*— but **to increase his diversions** by such amount in *excess* of said *demands* and of his *prior diversions* as, within his surplus conduit ca-

pacity, may be flowing in the stream, *merely* for the *benefit* of such *downstream proprietor;*

(3) That the **"waste"** of water prohibited by the State Constitution is inclusive of the **natural** discharge of water into a land-locked saline lake containing valuable mineral deposits, and imposes the *burden* on the appropriator of water from a stream *naturally feeding that lake* to take such measures as will *prevent the discharge thereinto* of the **surplus** *natural stream flow* for which he has **no use,** by diverting the same (in addition to the water *adequately* serving his needs), and **wasting** such *surplus* elsewhere, for the benefit of a private operator extracting minerals from the lake brines;

(4) That an appropriator of water is **estopped** to deny an *obligation* on his part to divert **293,000 acre feet** of water in a given year (1937),—or **151,000 acre feet** from *February to June,* inclusive, of that year,—by his *prior conduct* in diverting *annually,* over a series of years (1919-1936), a **minimum of 144,000** (1925) and a **maximum of 264,000** acre feet (1922),—or from *February to June,* inclusive, of these respective years, a **minimum** of 46,000 (1925) and **maximum of 105,000** acre feet (1927); and that a downstream proprietor may *thereby* **acquire,** as against such appropriator, a **right,** —*not measured* by, *nor commensurate* with the **conduct** of the appropriator **creating** such **right,**—but **transcending** the same by at least the **difference** between his **maximum prior diversions** (or his *current* needs)

and the **natural stream flow** that can be accommodated within the *capacity* of his aqueduct.[8]

(5) That said appropriator, in order to *dispose* of such *surplus water* **must,** at his peril, **acquire** the necessary lands and/or reservoirs and/or the flowage rights in any available stream, *at his own expense,* and *utilize* the same and the excess capacity of his conduit to effect **unneeded storage,** both surface and underground, in excess of any *prior* storage *practiced* by him, and also must

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[8]For the rule that one successfully pleading an equitable *estoppel* against another thereby *"acquires some* **corresponding** *right,* either of property, of contract, or of remedy," see Pomeroy Eq. Jur. [4th Ed.], Sec. 804, p. 1642. The author (pp. 1636-1637, footnote, styling the opinion of Perley, C. J., in *Horn v. Cole,* 51 N. H. 287, "an admirable and accurate presentation of the true reasons and grounds of the doctrine"), quotes therefrom in part as follows:

> "In this equitable *estoppel,* the party is forbidden to set up his legal title because he has *so conducted* **himself,** that to do it would be contrary to equity and good conscience."

Again, at page 1647, the author cites *Cornish v. Abington,* 4 Hurl. & N., 549, where Pollock, C. B., says:

> "If any person, by a course of conduct, or by actual expressions, *so conducts* **himself** that another may *reasonably infer the existence of an* **agreement or license,** it has the effect that the party using the language, or who *so conducted* **himself,** can **not** afterwards gainsay the reasonable inference *to be drawn from the words or* **conduct."**

Finally, see the author's quotation (p. 1651) from *Stevens v. Dennett,* 15 N. H. 324, of the statement that the doctrine of equitable estoppel **constitutes an** application of the maxim that "when one of two innocent persons must suffer *he shall suffer* who **by his own acts** occasioned the confidence and loss." Of this passage, Mr. Pomeroy says: "The judge [Foster, J.] has struck the 'bed rock' of *universal principle* upon which all instances of estoppel **must be founded,** if they are to stand with any firmness."

Note that, in the foregoing passages, it is the **conduct** of the party *against* whom estoppel is pleaded which is the *sole* matter of importance, and **not** in any case the **resultant** of that **conduct** and **natural forces** over which he had *no control.*

waste water both by the means indicated and also by indirect discharge into the sea—*all* for the *benefit* of such *downstream proprietor* and *irrespective of the constitutional guaranties* against such *spoliation*.

That each of these propositions is opposed not only to prior rulings of the Supreme Court of California, but also to the unvexed current of American and English authority, is fully demonstrated in our brief on certiorari herein, pages 36-63.

IV.

Public Importance.

The gravity of the results and the shocking injustices to appropriators of water that will flow from the judgment of the state court, call for its review herein upon a fuller presentation than is permissible in the application for certiorari.

Already there are in suit claims against petitioners in excess of one million dollars (in addition to the sum here involved) for damages suffered exactly as in these causes in the year 1938, when the **surplus** water of Owens River that flowed into Owens Lake was **249,000 acre feet,**—*i. e.*, over **five times** the volume of such flow **from February to June, inclusive, 1937.** Assuming *full continuous operation* of the Aqueduct *at capacity*, only 40,000 or 50,000 acre feet of this **surplus** could have been accommodated in the Aqueduct, over and above petitioners' then actual diversions.[9] This is but one example of the *recurrent claims* to which petitioners will be subjected by

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[9]Petitioners' diversions in 1938 were *in excess* of those in 1937, the *highest* then on record.

the *uncontrollable* **forces of nature** *determinative* of the *volume* of the flow of Owens River from time to time.

If a State court may mulct a litigant in damages, **for which he is in nowise responsible,** by the simple expedient of **substituting** for the *actual and uncontradicted facts in evidence,* a **supposititious state of facts** wherefrom **all of the undisputed controlling facts are omitted,** the guaranty of the 14th Amendment against such spoliation—enforceable ultimately only by this Honorable Court,—will take its place in the category of empty promises.

Conclusion.

For the foregoing reasons, petitioners respectfully pray that a rehearing be granted; that upon further consideration the Order of March 27, 1944, denying the petition for certiorari herein, be revoked; and that the writs of certiorari issue.

Dated at Los Angeles, California, April 7, 1944.

Respectfully submitted,

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City Attorney,
S. B. ROBINSON,
Chief Assistant City Attorney for Water and Power,
SAMUEL POORMAN, JR.,
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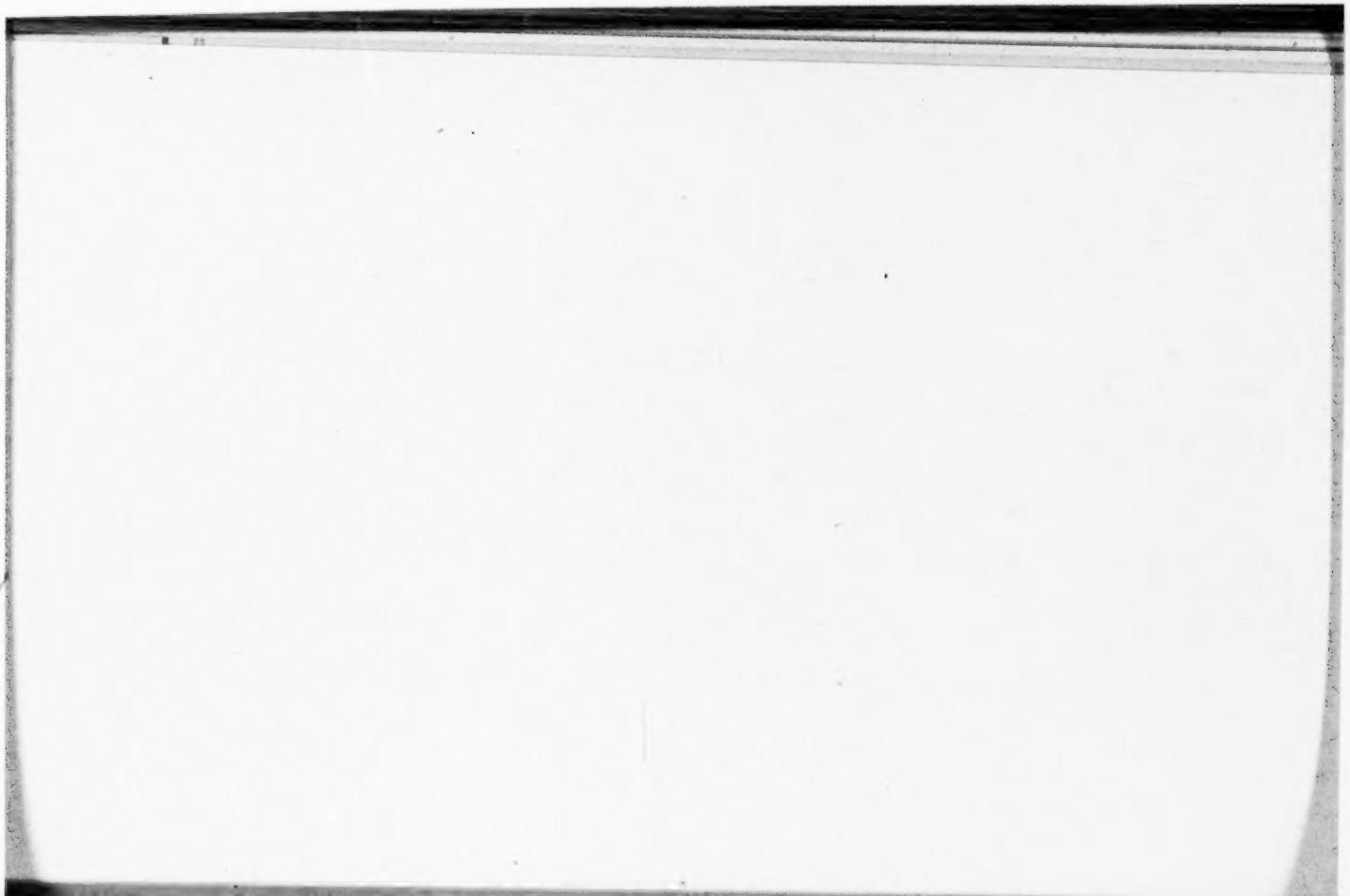
A. E. CHANDLER,
Special Counsel,
By SAMUEL POORMAN, JR.,
Counsel for Petitioners.

I, Samuel Poorman, Jr., counsel for the above-named petitioners, City of Los Angeles and Department of Water and Power of the City of Los Angeles, do hereby certify that the foregoing petition for rehearing of these causes is presented in good faith and not for delay.

SAMUEL POORMAN, JR.,
Attorney for Petitioners.



Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1944.

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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

No. 723

CITY OF LOS ANGELES (a municipal corporation), DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY (a corporation).

CITY OF LOS ANGELES (a municipal corporation), DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY (a corporation).

REPLY TO PETITION FOR A REHEARING.

KENNETH FERGUSON,
FRANCIS R. KIRKHAM,
JESS G. SUTLIFF,
Counsel for Respondent.

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REPLY TO PETITION FOR A REHEARING.

The only new contention advanced by petitioners is that the decision of the California Supreme Court for the first time imported a federal question into the case, so that the raising of the question after such decision was

timely. The argument is that the decision imposes upon petitioners the obligation to acquire flowage rights in lands on the Mojave Desert and in the channel of the Santa Clara River and to waste surplus water on that desert and in that channel. This ruling is said to deprive petitioners of property without due process of law, contrary to the Fourteenth Amendment to the federal Constitution.

There are several answers:

(1) No such decision was rendered.

(2) Even if the court had so held, the petition for rehearing filed in the state court did not sufficiently raise any federal question in connection with any ruling in the case.[1]

(3) Even if the court had so held, and a denial of federal right had been properly claimed in the petition for rehearing, such a raising of the federal question after decision would not have been timely. The question as a matter of substance is not new. It was involved and discussed in various forms all through the case. For example, one of the "questions involved" on the appeal to the court below—as stated by petitioners in their opening brief[2]—was:

> "(3) Is appropriator obligated under Constitution, Art. XIV, Sec. 3, to *prevent* stream flow *not*

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[1]See the quotation at page 8 of Petitioners' Reply to Respondent's Statement in Opposition to Motion for Leave to Proceed, etc.

[2]See "Statement of Questions Involved," quoted at pp. 3-4 of Respondent's Reply to Petitioners' Reply on Motion for Leave to Proceed on Typewritten Transcript.

diverted (because *not needed*) from *discharging* into *saline lake?*"[3]

And the petition for rehearing (page 2, et seq.) points out other instances when the question was discussed. At any time petitioners could have claimed and asked the state courts to pass upon any federal rights they deemed to be theirs in connection with this question. Their only "surprise" was by the adverse ruling of the court—not by its decision of the question.

(4) Even if the federal question now urged by petitioners had been properly raised, the decision below would still rest upon an adequate non-federal ground. As we have pointed out, petitioners' argument is based on the assumption that the state court held that it must acquire flowage rights on the Mojave Desert and in the Santa Clara River for the diversion of surplus waters. If this were true, the California Supreme Court also held:[4]

> "While the flow of water was unusually large for a brief period, it would have been within the capacity of the aqueduct had it been stored temporarily in available space, and gradually released where it would do no harm."

BRIEF OF AMICUS CURIAE.

Consent to file this brief has not been obtained (see Rule 27, paragraph 9, of the Rules of this Court), but

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[3]And see question (1) in "Statement of Questions Involved," supra, note 2.

[4]Appendices to Petition for Writs of Certiorari, p. 5; also, 23 A.C., at p. 195.

we do not oppose its filing. The brief states that the questions involved in the case are important questions of water law. No showing is made that any federal question was raised in the state courts. The questions discussed in the brief are obviously questions of state law, notwithstanding their general characterization as matters of federal constitutional right.

CONCLUSION.

We respectfully submit that the petition for rehearing should be denied.

Dated, San Francisco, California,
April 17, 1944.

Respectfully submitted,
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